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SOCIAL SECURITY DISABILITY REVIEWS: THE HUMAN COSTS

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON SOCIAL SECURITY

OF THE

COMMITTEE ON WAYS AND MEANS
HOUSE OF REPRESENTATIVES

AND THE

SPECIAL COMMITTEE ON AGING
UNITED STATES SENATE

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SOCIAL SECURITY DISABILITY REVIEWS: THE HUMAN COSTS

SATURDAY, MARCH 24, 1984

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON SOCIAL SECURITY, COMMITTEE ON WAYS AND MEANS; AND U.S. SENATE, SPECIAL COMMITTEE ON AGING,

Hot Springs, AR.

The subcommittee and special committee met at 9 a.m. in joint session, pursuant to notice, in the auditorium, Hot Springs Rehabilitation Center, Hot Springs, AR, Hon. J.J. Pickle (chairman, Subcommittee on Social Security) presiding.

[The press release announcing the hearing follows:]

[Press release of Thursday, March 15, 1984]

HON. J.J. PICKLE (D., TEXAS), CHAIRMAN, SUBCOMMITTEE ON SOCIAL SECURITY, COMMITTEE ON WAYS AND MEANS, HOUSE OF REPRESENTATIVES, ANNOUNCES A FIELD HEARING ON THE STATUS OF CONTINUING DISABILITY REVIEWS (CRD)

The Honorable J.J. Pickle (D., Texas), Chairman of the Subcommittee on Social Security of the Committee on Ways and Means, U.S. House of Representatives, today announced that the Subcommittee will hold a hearing to examine the present status of the social security disability review process. The hearing is to be held at the Hot Springs Rehabilitation Center, 105 Reserve Avenue, Hot Springs, Arkansas, on Saturday, March 24, beginning at 9:00 a.m. This hearing will be held jointly with the Senate Special Committee on Aging, represented by Senator David Pryor (D., Arkansas).

The hearing will focus on three main concerns: first, the effect of the present procedures on disability recipients; second, the growing pressure on the states to implement their own administrative procedures for this program in defiance of federal policy guidelines; and third, the inadequacy of administrative initiatives to resolve this crisis.

The Subcommittee expects to take testimony from invited witnesses including beneficiaries, state officials, and representatives from the Department of Health and Human Services.

In announcing the hearing, Chairman Pickle noted:

"It is critical that the disability program be properly administered since it provides the primary source of income for the majority of over 6 million physically or mentally disabled Americans.

"During the past three years, over one million disabled workers have had their continuing eligibility reviewed and 45 percent of them have been told they are no longer eligible for benefits. However, this determination has often been made erroneously. Nearly two-thirds of those who appeal these terminations have their benefits restored after enduring a lengthy appeals process. This process of review, benefit disruption, and legal review represents a serious emotional and physical threat to millions of disabled Americans and their families.

"As a result of the CDR procedures used, the whole social security disability program has been plunged into administrative chaos. In twenty states, the federal courts have intervened and substituted a court ordered standard of review for that called for by the Social Security Administration. In nine other states, the governors have declared a self-imposed moratorium on processing disability reviews. This combination of federally court ordered and state imposed actions has effectively brought to a halt the uniform national system of disability insurance under social security.

"The human costs of the current crisis," said Mr. Pickle, "are incalculable. The purpose of the hearings Senator Pryor, Congressman Beryl Anthony, Jr. (D., Arkansas) and I are holding is to demonstrate beyond doubt the folly of the Administration's reluctance to support the kind of legislative solution my Subcommittee has developed and the Committee on Ways and Means has unanimously approved."

WRITTEN COMMENTS IN LIEU OF PERSONAL APPEARANCE

For those who wish to file a written statement for the printed record of the hearing, six copies are required and may be submitted by the close of business Friday, April 6, 1984, to John J. Salmon, Chief Counsel, Committee on Ways Means, U.S. House of Representatives, Room 1102 Longworth House Office Building, Washington, D.C. 20515.

Chairman PICKLE. The Subcommittee on Social Security of the House of Representatives and the Special Committee on Aging of the Senate will come to order.

We have a full schedule this morning of some 12 to 15 witnesses, and we hope that we can proceed rapidly but carefully in receiving the testimony and participating in this program. The witnesses have been asked to limit their comments to 5 minutes. We have written statements which will be available for everyone and will be made part of the printed record.

I would want to make a preliminary statement and then I'm going to yield to our distinguished representative here in Arkansas, and we'll proceed in that order awaiting the arrival of Governor Clinton.

So, first let me start this meeting off by making this statement and this is a departure from my statements which we have made in other cities because of some development that may have taken place, or will take place in Washington.

I want to read this statement to you so that you will understand a proposal that the administration is making. I've been informed that this morning's Washington Post reports that the administration plans to announce an 18 months moratorium on terminating benefits for social security disability beneficiaries.

Normally this would be a helpful step. However, it is a cynical and irresponsible action today coming just one day before our disability legislation that has been developed over the last year, comes to the House floor. It represents an abuse of the powers and the responsibility of public office.

The timing of this announcement clearly stamps it as a shocking and disreputable attempt to intervene and divert the legislative process. This administration is playing politics with the lives of thousands of disabled people.

This moratorium is a cruel hoax offering false promises of relief to the disabled while, in fact, helping to bring about the total and complete disruption of the disability insurance program. This proposal is a clear admission by this administration that their management of the disability program is a complete failure.

This is the same senseless approach that the administration took toward the Social Security Program 3 years ago when President Reagan proposed severe cuts in the benefits of our elderly and our poor.

The President's policy then cost the administration dearly in the elections of 1982. It was viewed, and viewed correctly, as an attempt to undermine the very basic standards of living earned by the majority of the Nation's elderly.

Now the President, through the policy being discussed in Department of Health and Human Services and the Office of Management and Budget is trying to stop progressive legislation, which is designed to bring relief to the countless thousands of people on disability insurance now.

In my opinion this is just one more example of a streak of meanness toward Human Services which runs throughout this administration. The bill that we are hoping can be passed immediately is desperately needed to restore order to a program, which in the past few years has been reduced to chaos.

I simply must remind you that there have been some 500,000 terminations here in the last 3 years; 160,000 more have been appealed and two thirds of those have been reinstated by the ALJ.

It is obvious then that the administrative action taken by the administration has not solved this problem. And, an 18-month delay simply just postpones the inevitable. What we need is action to pass legislation which corrects the problem. A moratorium does not cure anything. More than that it can cost us more in the long run.

So what we need is passage of legislation that will address these difficulties. This committee has been holding hearings throughout the country for the last month and a half. We've held hearings in Boston, MA, in Dallas, TX, and yesterday afternoon in Atlanta. And, today here in Hot Springs. I think this is one of the most well attended and active groups that we've appeared before. So the subcommittee is pleased to be here.

Rather than to make an additional statement I'm going to include my statement in the record, as I'm going to do for some of you.

[The statement follows:]

STATEMENT OF HON. J.J. PICKLE, CHAIRMAN OF THE SUBCOMMITTEE ON SOCIAL SECURITY, COMMITTEE ON WAYS AND MEANS

Today, this Subcommittee holds our fourth and last field hearing on the social security disability program. We have held hearings in Dallas, Boston and Atlanta, and I hope our testimony today will be as frank and helpful as the previous ones have been.

I am truly sorry that we have to conduct these hearings at all. The problems of the disability program have occupied this committee's time for almost a year now. We have put together legislation, H.R. 3755, that will resolve the problems we heard about last week and that I assume we will hear about again today.

I particularly regret that the Administration, after working with us last year to develop a responsible bill, has abondoned this cooperative process, and is now saying no legislation is necessary.

I find this attitude discouraging, and once again, I urge the Administration to reconsider their refusal to work with the Congress on this matter.

The Congress has focused on the disability program several times over the last six years to ensure that all those who are fairly entitled to benefits receive them. In 1980, our concerns led us to enact a requirement that SSA re-examine all beneficiaries periodically to make sure they are still eligible for benefits. This is a sensible, fair, administrative process, and the Congress was correct in requiring SSA to do it.

However, we left considerable leeway for the Administration to put this requirement into effect, and that's where the problems began. In 1981, this Administration, in order to get immediate budget savings, began the continuing disability reviews a year before they were required, and greatly accelerated the numbers of reviews.

This too hasty and harsh implementation of a sensible legislative requirement has proven disastrous.

When we passed the bill in 1980, the continuing review provision was estimated to save $168 million in its fifth year of operation. The current Administration estimate is $1.6 billion, almost 10 times the original estimate. During the past three years, nearly 500,000 beneficiaries have been told they are no longer eligible for benefits. Nearly two-thirds of those who appeal their termination have had their benefits restored, which is some indication of how many erroneous decisions have been made.

Although reinstated, these beneficiaries have suffered through a lengthy, stressful and often expensive process.

As a direct result of the CDR procedures used these past three years, the entire social security disability program has been plunged into administrative chaos. In twenty states, the Federal courts have substituted a court-ordered standard of review for that called for by the Social Security Administration. In nine other states, the governors have declared a self-imposed moratorium on processing disability reviews. The Administration is now threatening sanctions against those States that do not comply with Federal standards.

The disability bill that our Subcommittee developed, based on major contributions by my colleague here today, Cong. Beryl Anthony, is a responsible solution. I would add here that we have worked in close coordination with our good friends in the Senate and with the continuous strong leadership of Senator Pryor we look forward to success in the other body. This bill should be adopted because it establishes a sound and fair medical improvement standard, uniform national standards for decisions, continuation of benefits through appeal, and earlier face-to-face interviews with claimants at the state agencies, among other provisions. This legislation seems to us the best way to restore order to the process.

Yet we are told by the Administration that no legislation is necessary, and that the whole situation can be remedied by internal administrative reforms. I find that hard to believe, but I am willing to investigate it, and that's the purpose of this hearing. We need to hear whether there are still problems with the program, and whether administrative action alone can resolve them. If, as I believe, the program is truly in a mess and enactment of our bill is the best route to solve that mess, that message must be sent loud and clear to the Administration.

I have been informed that this morning's "Washington Post" reports that the Administration plans to announce an 18-month moratorium on terminating benefits for social security disability beneficiaries. Such a cynical, irresponsible action, coming just one day before our disability legislation that has been developed over the last year comes to the House floor, represents an abuse of the powers and responsibilities of public office. The timing of this announcement clearly stamps it as a shocking and disreputable attempt to intervene in and divert the legislative process. This Administration is playing politics with the lives of thousands of disabled people. This moratorium is a cruel hoax, offering false promises of relief to the disabled, while in fact helping to bring about the total and complete disruption of the disability insurance program that millions of disabled workers and their families rely on.

This proposal is a clear admission by this Administration that their management of this program is a complete failure.

This is the same senseless attitude that the Administration showed toward the social security program three years ago when President Reagan proposed severe cuts in the benefits of our elderly and our poor. The President's policy then cost the Administration dearly in the elections of 1982. It was viewed, and viewed correctly, as an attempt to undermine the very basic standard of living earned by the majority of our nation's elderly.

Now the President, through policies being discussed by the Department of Health and Human Services and the Office of Management and Budget, is again trying to stop progressive legislation which is designed to bring relief to the countless thousands of disabled people who have been the victims of the Administration's failures.

This is just one more example of a streak of meaness toward human services throughout this Administration.

The bill which we are considering today is desperately needed to restore order to a program which in the past three years has been reduced to chaos.

Chairman Pickle. All right, I'm going to recognize Senator David Pryor to make such comments that he might care to make at this time. David Pryor and I served in the House of Representatives together. I've known him a long time. There's no finer representative from Arkansas or any State than David Pryor. We served together in the House and we served together on a historical committee because he has an abiding interest in preserving the history of this country. So I'm pleased to present my friend and your outstanding Senator David Pryor.

OPENING STATEMENT OF HON. DAVID PRYOR, A U.S. SENATOR FROM THE STATE OF ARKANSAS

Senator PRYOR. Thank you, Congressman Pickle.

At the outset I would like to express my deep appreciation this morning to the Hot Springs Rehabilitation Center for providing us with this very, very excellent site for the hearing on Social Security Disability Reviews: The Human Costs.

This is one of the series of hearings which the Senate Special Committee on Aging and the House Ways and Means Subcommittee on Social Security are holding jointly throughout America. These hearings focus attention on the continuing need for comprehensive reform of the manner in which the reviews of the status of nonpermanently disabled individuals receiving Social Security and supplemental security income benefits are being administered.

I would like to add that Arkansas is very, very honored today to have the presence of Congressman Pickle of Texas. Congressman Pickle is chairman of the particular House subcommittee which has jurisdiction over this matter. He has been a leader in the House of Representatives and in the Congress for efforts in the House toward approval of comprehensive reform legislation.

This hearing is very timely. It appears as early as next week the House may be voting on the disability proposals which Chairman Pickle's subcommittee developed, notwithstanding the announcement just a few moments ago read from the Washington Post by Congressman Pickle.

All of us in the State of Arkansas can be proud also of Congressman Beryl Anthony who represents this district with dignity, honor and compassion. He is also a member of Congressman Pickle's subcommittee, and he has played a critical role in securing committee approval of these amendments.

As a member of both the Special Committee on Aging and the Subcommittee on Social Security and Income Maintenance Programs of the Senate Finance Committee, I deeply regret I cannot report similar progress in the U.S. Senate.

Since 1981, when the triannual reviews of nonpermanently disabled individuals began I have consistently expressed my displeasure at the procedures the Social Security Administration was using to eliminate as many people as possible from the disability rolls—deserving people, helpless people and people who had no other place to go for income maintenance.

Over time it became clear that something was terribly wrong and very inhumane, and Members of Congress called for reform in this area. The Social Security Administration callously ignored our concerns and continued to terminate tens of thousands of truly disabled beneficiaries.

Many appealed the termination decisions. Some were eventually reinstated, but only after a lengthy appeals process which involved physical, emotional, and financial hardship, and in some cases absolute disaster. The unnecessary human suffering of these individuals and their families and friends cannot be measured in terms of dollars.

I feel certain that there are many who deserved to retain their benefits, but never even attempted to do so because they could not face the almost certain uphill battles and possible bitter disappointment.

Toward the end of the last session of Congress it appeared that the members of the Senate and officials of the Social Security Administration were very close to an agreement that would have significantly improved the disability review process.

Unfortunately with the beginning of the new session in 1984 it became very clear that Social Security Administration had made a complete about-face in this area.

During a recent hearing before the Senate Finance Committee, Mrs. Martha McSteen, the Acting Commissioner of the Social Security Administration—we do not have a permanent Commissioner I might add—stated the Administration's opposition to any legislative reforms in the disability area.

The results of the Social Security Administration's refusal to try to work toward an acceptable modification of the disability program have resulted in total chaos. More than half of the States have imposed moratoria of some type.

Some entire regions of this country have been ordered by the Federal courts to use standards other than those promulgated by the Social Security Administration. As a result what do we see? We no longer have a standardized national program of disability insurance for our workers.

Instead we have a patchwork of differing disability programs, programs that differ from region to region, from State to State and even person to person. I do not believe this was the original intent of this legislation.

Finally, I have very mixed feelings about the scheduling of this meeting this morning. On one hand I'm hopeful that the information which will be given to us from our panels of expert witnesses will provide a new understanding and awareness of the magnitude of the problems within the disability program. We will also be able to share with all of you what is happening in Washington.

On the other hand I must say and must admit that I, as an individual, and I as a Senator, have a feeling of great frustration, frustration over the countless lives which have been irrevocably and unnecessarily damaged, and our inability to date to enact effective legislation.

I do not want to discourage you. I do feel that there is a growing consensus in House and Senate to take action in the very near future on comprehensive disability reform. I want to pledge to you today that I will continue to do all that I can do, all that I'm able to do, to commit myself to see that 1984 is the year in which we see final action on the reform legislation that we need.

Congressman Pickle, thank you very much, and Congressman Anthony, thank you very much. And, once again thanks to those of you who have come and those who have helped us in the preparation for this hearing this morning in Hot Springs, AR.

Chairman PICKLE. Senator Pryor, we thank you and we thank you for coming here this morning and showing your interest.

[Applause.]

Chairman PICKLE. The Chair will ask that there be no demonstration as the various individuals, even your Senator, make their remarks.

Now, I want to recognize my colleague, Beryl Anthony. A year ago when we passed the Social Security reform bill—I think the most important piece of legislation passed the last 2 years in the U.S. Congress. A member of the subcommittee took a very active part in help bring that about, and that member was Beryl Anthony.

He asked to serve on this subcommittee and we wanted him to serve on the subcommittee, and he's been very active and interested. The bill that we have before us now, H.R. 3755, can well be called, and should be called the "Anthony bill," because he's coauthor of this legislation.

He and your Governor, who will be here shortly, have been as instrumental in asking for passage of this type of legislation as anybody in the State. So, I'm particularly pleased to present my friend and colleague, and your Congressman, for many of you, the Honorable Beryl Anthony.

Mr. ANTHONY. Thank you very much, Mr. Chairman. Senator Pryor and Mr. Pickle, I thank both of you for making this hearing possible, especially Senator Pryor for adding the influence of the Special Committee on Aging from the Senate. I consider this to be one of the most important field hearings that I will participate in, in my district during this particular session of Congress.

Disability, unfortunately only applies to a few individuals. It's not something that is wide spread across the United States, but those people and those families affected by it are affected in every way that you possibly can be, both financially and emotionally.

When you have an administration that takes a mandate from the Congress but tries to enlarge upon that mandate in order to make their budget look better and expedites the hearings, and then changes the rules during the play of the game, it creates chaos. And, that is exactly what has happened.

We know that this administration has played politics with this program in the past. Mr. Pickle has just read to you a news statement that he literally had to make over and above his prepared statement because we have found out just since this hearing has been scheduled, and knowing that our piece of legislation is scheduled for Tuesday, that the administration is likely to try to do something on Monday.

I think this is in total callous disregard for the lives and the families of those people that are affected. They do it solely for politics. This is an area where you have got to take politics out of the game. I don't care if you are a Republican, a Democrat, an independent or if you don't care about any of those three. This is an area where you have to rely upon good humanitarian judgement, and you have to follow the law that has been passed.

To be quite honest with you I thought the chairman was very kind and gracious, even though he used harsh terms when he made that statement. I think if you could get him off in private, or, if you could have overheard some of the telephone conversations that I was party to in the last 12 hours you would know that this is an individual who has fought for your cause, and taken your message straight to the administration's officials who have to carry this sorry message to the public.

We'll have to see what they do on Monday. I think the House of Representatives is going to give them a loud message when we vote to restore some sanity to the disability program on Tuesday.

I do have a prepared statement, Mr. Chairman, and I would like to submit it for the record.

[The prepared statement follows:]

OPENING STATEMENT OF HON. BERYL ANTHONY, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARKANSAS

Mr. Chairman and Senator Pryor, I appreciate your support in organizing this important field hearing on the Social Security Disability Insurance program.

We are here today because hundreds of horror stories have made their way to our offices over the past two years as the Reagan Administration has tried to comply with a Congressional mandate to remove ineligible recipients from the Disability program. Unfortunately, there is a great deal of evidence that in their haste to remove those who should not be on the disability rolls, and to provide a certain level of cost-savings in the program, the Administration has used a meat-ax approach and slashed checks to many persons actually disabled who deserve support under the program.

Disability reform gained momentum in the mid-1970's because of the increasing cost of the program. Most people concluded that the growth of the program was due to large numbers of ineligible persons on the rolls. The solution was to rid the rolls of those who were not truly disabled and provide incentives to beneficiaries to return to work.

Responding to the need for more effective management of the program, Congress passed legislation in 1980 that required an increase in the amount of management review and oversight of the program. Among the changes required at that time were federal review of beneficiaries not permanently disabled at least once every three years; a report on the wide variations in Administrative Law Judge decisions; and directions to the Secretary of Health and Human Services to prescribe regulations for state agency determination procedures.

The pendulum has now swung the other way. The concern in Congress now is over the standards and methods being used to examine beneficiaries and terminate their benefits, and the attempts by the Social Security Administration to exert more control over the ALJ's and their decisionmaking standards. The massive and swift review of cases by the Social Security Administration has caused serious emotional, physical and financial harm to thousands of disabled Americans, and left the ALJ's feeling forced into making decisions that are favorable to the Social Security Administration.

No Member of Congress condones the receipt of disability benefits by those who are not disabled. What we are working on in Congress is a program that is fair, compassionate and just. The Ways and Means Committee has reported out legislation to provide for the needed reforms in the administration of the program. I hope this hearing will draw attention to the crisis we have in the current program, and the need for passage of the legislative solution the Ways and Means Committee has developed.

Today we will focus on the effect of present procedures on disability recipients; the growing pressure on the states to implement their own administrative procedures for the program in defiance of federal policy guidelines; and the inadequacy of administrative initiatives to resolve the problems in the program.

I look forward to the testimony we will receive from the public witnesses and thank you and each member of our audience for taking the time to participate in this hearing.

Mr. ANTHONY. Before I introduce our first witness there are some people that I would like to publicly thank, if you will just permit me one indulgence. After I introduce these people I think it would be nice if the audience would give them a nice show of appreciation, because without their help this hearing would not be possible.

Mr. Russell Baxter is the State Commissioner for Rehabilitation, and he has been so nice to work with in making this facility available, working with my staff and Senator Pryor's staff to insure that the public is made welcome and comfortable here. We thank you, Mr. Baxter.

Gene Harwood is the administrator of the Hot Springs Rehabilitation Center. He has worked with us very closely. Unfortunately I can't name every member of the staff, but seriously, all of the members of the staff have really contributed to make this a worthwhile endeavor.

And, I think we owe others a special debt of gratitude. If you would cast your attention over to my left, your right, we have Karen Crebbs and Violet Shirley who have volunteered their services as deaf interpreters. I think this is very critical so that all people can participate in this worthwhile hearing.

We have invited some of your State representatives and State officials to this hearing inasmuch as the Governor got the State of Arkansas involved in this. Although they don't have specific authority, they did hold some legislative oversight hearings because they were concerned about it in the State of Arkansas. I recognize at least one of my friends in the audience, State Senator Bud Canada.

We have invited, and I know they have participated in helping us also, State Representative John Parkerson, State Representative Ted Mullenix, your County Judge Bud Williams, and also Herb Sanderson who is from the State Office of Aging.

So, Mr. Chairman, if you would just please indulge me one moment, and if the audience would—these people have made this possible. Let's just give them a round of applause. [Applause.]

Mr. Chairman, Senator Pryor, our first witness is an individual who has publicly expressed his indignation about what has happened. He has shown that the regulations are not in tune with the law that has been passed by the circuit that we reside in. He's an individual who has taken this message all the way to the National Governors' Association.

He's been instrumental in getting the National Governors' Association to go on record with a national resolution encouraging the administration to cease and desist what they were doing, and in encouraging the Congress to pass the legislation to try to bring some sanity where chaos has existed in the past.

It gives me great pleasure, Mr. Chairman, to introduce the incumbent Governor of the State of Arkansas, Mr. Bill Clinton, as our first witness. [Applause.]

STATEMENT OF HON. BILL CLINTON, GOVERNOR, STATE OF ARKANSAS

Governor CLINTON. Mr. Chairman, Senator Pryor, Congressman Anthony, I appreciate——

Chairman PICKLE. Governor, before you proceed let me add my personal welcome to you. I enjoyed visiting with you in Washington, and I suppose as much as any Governor in the United States you've taken the lead in trying to ask for corrections in this program.

So, we take personal pleasure in welcoming you to this subcommittee.

Governor CLINTON. Thank you very much, Mr. Chairman. The gentleman to my left is Mr. Julius Kearney. He is a person whom I have appointed to direct the Social Security Disability Program in our State. As you know, this is a unique program inasmuch as all the employees who administer the program are paid by Federal tax dollars, and all the benefits are 100-percent Federal tax dollars, but the administrators with no exception in all the 50 States are State appointees of the Governor.

We're in the difficult positions, all the Governors are, of administering a program which is by policy totally controlled by the Federal Government and by financing totally controlled both in terms of the employees salary and benefits by the Federal Government, but one for which we must assume some responsibility.

And, I think it is fair to say that for the last significant period of time, which has already been outlined and discussed, no Governor in America has been proud to be responsible for the administration of the program. No Governor in America has had confidence in it, and all the Governors in America, without regard to party, I agree with what Congressman Anthony said—I think it's very important to emphasize that without regard to party 100 percent of the Governors adopted the policy which I drafted at the Governor's conference last August calling for significant changes in the administration of this program.

The problems are obvious and have been well outlined. I've been privileged to testify in the House before the Select Committee on Aging and before Senator Pryor, Senate Finance Committee in the Senate, and I'm sure that there are people here who will testify more eloquently than I to the problems in the administration of the program.

I would just like to emphasize a couple of points. First of all, I want to emphasize the fact that in Arkansas we don't just complain or seek to disrupt a national program. We have continued to strive for a public dialog on solutions. I have never opposed the legislation which the Congress passed back in 1980, to review this process and to try to remove people who should have not been put on in the first place.

We have never pretended that there were no problems in the administration of the program as of 1980, and we continue to be and resolute in sponsoring solutions. That's what the National Governors' Association policy states, which I drafted and which all Governors supported. It offers a solution.

I would say that the legislation now pending in the House and in the Senate substantially embodies the policy recommendations of the Governors. In our efforts to work with Social Security Administration I think I should point out that my Director, Mr. Kearney, who is here to my left, immediately upon his appointment at my request began a dialog with Social Security's Regional Director in your State.

These discussions and the related review of court cases and social security decisions nationwide, have consumed many hours of Mr.

Kearney's time, and frankly my time. I have attached a copy of a letter which Mr. Kearney wrote on February 7 to the Acting Regional Commissioner, and a subsequent proposed memorandum of understanding which basically outlines our position regarding continuing disability claims, to my testimony and which I hope you will have the staff review, because it shows what we're trying to do to work out an understanding with the regional office that we can live with and have confidence in while we wait for congressional action.

It is clear that both the Regional Commissioner and Mr. Kearney have made concessions for the good of the program and our efforts to work out our problems locally. And, we have good cordial relationships with the people at the regional level. Even though at this time we don't have any formal response to our proposal because if our proposal is formally accepted among other things it would permit us to adopt a medical improvement standard and the disability review process.

The point I want to make here is that even if we get this done it'll be a poor excuse for uniform Federal action. And, I cannot tell you—I don't know what else the Governors can do. It is not—I don't feel very comfortable in this situation that I've been in with the moratorium that has been imposed where I am the equivalent, the modern day equivalent of standing in the schoolhouse door, I guess.

I never thought when I entered public life that I would be in a position of defying Federal authority, but I find that the Federal authority unlike the last time any Governors and States were defying Federal authority—in this case we have a national administration that instead of trying to implement Federal court decisions is itself trying to defy them.

So, I find myself as Governor, trying to act in a way that is consistent with every, virtually every Federal trial court and appellate court decision, but defying the Administrator for the executive branch of Federal Government.

I cannot emphasize too strongly that we have got to have some legislation out of the Congress on this. Suppose we work out a good memorandum of understanding and your staff can brief you about it. What's that got—that just means in Arkansas we've gotten into this issue, we're trying to do right by our people. There's still lots of other people, hundreds of thousands of them around this country that may have Regional Social Security Commissioners or whatever, that will never work it out.

We have got to have legislation on this. And, the House and the Senate have got to face the problem and recognize it. I don't know how strongly to say it. I would recommend among other things that the legislation, to be meaningful, would have to include some provision for medical improvement standard.

We all recognize that an error might have been made in assessing someone's real capacity to work. We all recognize that there might be improvements in medical science which would permit treatment, which would enable someone to return to work. We all recognize that perhaps our efforts to open up and make accessible work opportunities to people who formerly were thought to be too handicapped to work might change people's ability to return to work.

But we cannot have a meaningful review process without a meaningful medical improvement standard, because you can look around this room and I'm sure people will testify about it today. There are countless people in this country who have been kicked off this program who have no reasonable prospect of returning to work.

In this town where I grew up, in 1982 I was campaigning for Governor in the unemployment office in this town. And, we had a very high unemployment rate. We just lost a plant that laid off 800 people, and I walked in the unemployment office, which is about a mile from here. And, there were people there that were in their early twenties looking for jobs.

There were people there my brother's age, in their midtwenties looking for jobs. There was a woman there my mother's age looking for a job. And, in the middle there, there was a man there that I have known casually for many years. And, I said, what are you doing here in the unemployment office? He said, well I've got good news. He said, I just got a letter from my Government telling me I was healthy again after being on disability for 10 years, and to get out and get a job.

And, I said, has there been any change in your medical condition in the last 10 years since you've been on this program. And, he said, yeah, he said about 8 months ago I had a quadruple heart bypass. That's the change in my medical condition.

Now, everybody can tell these stories, but there's got to be Federal legislation and first and foremost any Federal legislation has got to have some kind of medical improvement language in it. I think that the administration should be required to continue the face-to-face interview process, and that ought to be legislation.

I think the legislation should make permanent the present administration policy on benefits continuation. I think that the Social Security Administration should be required to implement regulations effecting disability determination in a manner consistent with the Administrative Procedure Act.

That will prospectively help to clear up some of this hodgepodge of regulations where nobody really knows what the rules are and where they seem to be different from place to place. I think that legislation should require that the States provide the claimants' treating physicians with copies of the consultating examination reports where there's a conflict of medical opinion.

I think and believe that there is a serious problem regarding the determination of disability where claimant's complaining of multiple impairments or where there is credible testimony regarding subjective complaints, but not objective medical findings.

SSA should be required to consider the combined impact of multiple impairments. I believe inasmuch as the courts have uniformly required that SSA give greater weight to findings and opinions from the treating physicians over findings and opinions of the consultants who saw the claimant only for the purpose of aiding disability determination the language of Federal legislation should reflect that physician.

I think the State should be returned, and this is one area where I think we need some flexibility if you want us to run the program, the State should be returned greater discretion to define disability where severe impairments exists, even though the impairments are not included in the official listings.

I believe that legislation should guarantee that the time for appeal of decision denied or ceasing benefits to a claimant who alleges mental illness, mental retardation, borderline mental retardation, increased mental capacity, drug dependence or alcoholism is a basis for disability should not begin to run until a representative is appointed and notified or until direct contact with the claimant insures that the claimant is capable of understanding the impact of the denial.

Finally we believe that SSA should set up projects to study the effectiveness of concerted vocational rehabilitation efforts. Since we are in this building today I think it is important to emphasize that I know you'll have testimony—but one of the cruel ironies of this whole process is that at a time the administration decided to use disability cutoffs as a way to help balance the budget or minimize a $200-billion-a-year deficit—which is just a drop in the bucket.

The same administration also recommended the virtual eradication of all vocational funds to help people, many of whom are in late middle age who are going to be terminated from benefits after not having worked for a very long time, to further insure that their termination will be a failure.

And, so I hope that the Congress will give some thought to this. In closing, let me say again I think I can speak on behalf of the people of Arkansas as well as on behalf of every Governor in this country—we are not comfortable being in an adversary position with the administration, where we seem to be defying Federal Executive orders and interpretation of legislation.

But we are even less comfortable being the instrument of cruel policies to disabled people in this country. So, we—if we have to choose—we're going to try to do what we can to do as much justice and fairness as possible. This thing is not going to be settled unless you all act.

And, I am just imploring you to take your own passionate conviction and involvement back to the Congress and try to get some action. Finally, let me say that Senator Pryor will remember when I testified in the Senate. One of the Senators suggested that the Federal Government should fire Mr. Kearney here, and take over the program, because I had my foot in the schoolhouse door and was defying Federal authority.

And, I told them if they weren't going to clean up the program I wished they would take it away from me, because I was ashamed to run it in the condition it's in, and I didn't want to look my constituents in the face and have any responsibility for it.

So, I think I've said all I can say, but please do what you can to make the Governors' case for Federal action. We do not want to defy Federal authority, but we cannot implement this program as it has been handed down to us.

Thank you very much, Mr. Chairman.

[The prepared statement follows:]

STATEMENT OF HON. BILL CLINTON, GOVERNOR OF ARKANSAS

I would like to thank you for this opportunity to outline my position as Governor of Arkansas on the issue of Social Security Disability. My testimony here is brief and does not recount the horror stories and background information which are public knowledge.

We believe strongly that the Disability Program has two very different, but inter-related problems: (1) The continuing disability review process is grossly defective, is not uniformly implemented, and is not responsive to congressional intent or judicial review; (2) The criteria for the basic determination of disability are controlled by a mixed-bag of statutes, regulations, official instructions, directives and internal policy statements, all having the force of law so far as SSA and state disability programs are concerned. Unfortunately, some of the regulations, instructions, directives and policy statements violate the letter and intent of relevant federal statutes, and others are binding although communicated only orally. Further, SSA has refused to honor relevant Eighth Circuit Court decisions which interpret and seek to enforce the statutes. Because SSA may change its interpretations at will, without public comment or regard for the law or the courts, Arkansas' disability adjudicators are kept in a state of flux.

I have addressed these problems on many occasions, including in testimony before the House Select Committee on Aging last June and the Senate Finance Committee this past January. The problems are simply outlined: Over 60 percent of both initial and continuing disability claimants receive favorable decisions by Administrative Law Judges, who were hired and trained by the Social Security Administration, after State DDS staff, following Social Security Administration guidelines, have made unfavorable decisions. Even the law judge system is breaking down. For three consecutive days in the next month, a law judge from another state will be holding hearings in Fayetteville, Arkansas. From 7:00 a.m. until 5:15 p.m. each day, the Judge will hear a case every 15 minutes, without a break for lunch. How can we expect careful consideration of each case on its own merits? Second, in practically every federal Judicial Circuit, there are myriads of decisions ordering the Social Security Administration to change its rules to conform to law. Finally, we continue to hear of horror stories, both among persons initially applying for benefits and among persons threatened with being cut off benefits.

It should not be said that we in Arkansas only complain or seek to disrupt and fragmentize a national program. We have continued to strive for a public dialogue on solutions. In August I wrote and sponsored a policy statement before the National Governors' Association calling for major reforms in the disability process. The statement passed unanimously, clearly a bipartisan expression on the issue from our nation's Governors. The needed reforms outlined in the NGA statement will be covered later in my testimony.

In a further effort to work with the Social Security Administration on solutions, Julius Kearney, immediately upon his appointment as Director of the Department of Disability Determination in December, at my request and with my blessings, began a dialogue with Social Security's Regional Commissioner. Those discussions and the related review of court cases and Social Security decisions nationwide have consumed many hours of his time, and of my time. I have attached a copy of Mr. Kearney's letter dated 2-7-84, to the Acting Regional Commissioner, and a subsequent proposed memorandum of understanding which basically outlines our position regarding continuing disability claims. In comparing the two documents, it is clear that both the Regional commissioner and Mr. Kearney made concessions for the good of the program. We have agreed on the above memorandum and have very cordial relations with the Regional Commissioner and her staff. At this time, we have received no formal response to our proposal.

It is my belief that the following proposals address the major concerns with the entire Disability Program. Certainly, legislation is required, and I appreciate the efforts of each of you in seeking Congressional action. We cannot continue under a hodge-podge of court decisions and conflicting administrative actions. The urgency is evident; we need action, not further rhetoric.

Major reform must be implemented, without delay, at least in the following areas:

MEDICAL IMPROVEMENT

We propose the standard on medical improvement included in the attached memorandum of understanding be made law. The "recommendations" included in Point III of that memorandum should be a part of the law. In determining the present capacity to return to the work force, the following factors should be considered:

(a) Comparison of present and prior estimates of residual functional capacity;
(b) Medical advances discovered or made available since the initial determination of disability;
(c) Work place/access advances making it possible for more handicapped persons to enter or remain in the work force;
(d) The amount of unproductive time spent out of the work force subsequent to the initial disability determination; and
(e) Claimant's age, education and work history.

FACE-TO-FACE INTERVIEWS

The administration should be required to implement face-to-face interviews prior to a decision on all initial and continuing disability claims. There are several configuration options for implementing this program. The simplest and least costly would be retraining of Social Security District Office Claims Representatives (CR) who handle these cases at the outset. The CR should be required to elicit additional information and to make more detailed notes on a claimant's appearance, movement, complaints, and visible handicaps. SSA's own experiments show the effectiveness of some variation of the face-to-face interview in improving decisional quality. Combining the Disability Hearing Unit, presently in place at the Reconsideration level, with the initial level interview should cover most major objections. Alternatively, the full evidentiary hearing, with related procedural rights, could be moved up to the initial level, and the Reconsideration level could be abolished.

BENEFITS CONTINUATION

New legislation should make permanent the present administrative policy continuing disability benefits through the Administrative Law Judge level in all continuing disability review cases. Congress previously recognized the need for such legislation but failed to take action in 1983. The Secretary recognizes the need for some such legislation. Additionally, benefits should continue during the judicial process, where the Secretary fails to complete the record for review within 30 days of service of the complaint.

EMPLOYMENT OF RULES RATHER THAN INTERNAL POLICY STATEMENTS

SSA should be required to implement regulations affecting disability determinations pursuant to the Administrative Procedures Act. The regulations should be applicable to all levels of SSA adjudication and be based on statute and applicable court decisions. In this regard, SSA should be required to acquiesce in, or appeal, circuit court decisions modifying or abrogating its rules or regulations. Where decisions in two or more circuits conflict, SSA should be required to seek appellate clarification.

CONSULTATIVE EXAMINATIONS

Legislation should require that the States provide the claimants' treating physicians with copies of consultative examination reports where there is a conflict of medical opinion on the issue of disability.

COMBINATION OF IMPAIRMENTS/PAIN

There is a serious problem regarding determination of disability where claimants complain of multiple impairments, or where there is credible testimony regarding subjective complaints (i.e. pain, psychosomatic conditions) but not objective medical findings. SSA should be required to consider the combined impact of multiple impairments in disability determinations and not to look at each problem as if it exists in a vacuum. Where the combined impact of two or more "non-severe" impairments is disabling, a claimant should be entitled to benefits. Likewise, SSA should be required to consider all relevant factors, including work history, medical treatment history, alleged onset circumstances, and claimant's creditability in determining whether a subjective disability claim is valid. There should be no legal requirements that objective medical findings (i.e. end organ damage in diabetes, hypertension, and alcoholism cases) support every claim.

TREATING PHYSICIAN VS. CONSULTANT

The courts have uniformly required that SSA give greater weight to findings and opinions from the treating physician, over findings and opinions of consultants who saw the claimant only for the purpose of aiding in the disability determination. Where the treating physician's findings and opinions are based on contact with the claimant over time, those opinions and findings, where grounds are stated should be accepted unless rebutted.

LISTINGS OF IMPAIRMENTS

The states should be returned greater discretion to find disability where severe impairments exist, even though the impairments are not included in the "Listings". Additionally, the present administrative initiative requiring expert and interest group input in a review and reform of the listings should be put into law. The listings should be revised every 5 to 7 years, or more often, if medical science advances so warrant.

DENIAL OF BENEFITS TO CLAIMANTS ALLEGING MENTAL DEFICIENCY, DRUG DEPENDENCE OR ALCOHOLISM

Legislation should guarantee that the time for appeal of a decision denying or ceasing benefits to a claimant who alleges mental illness, mental retardation, borderline mental retardation, decreased mental capacity, drug dependence, or alcoholism as a basis for disability shall not begin to run until a representative is appointed and notified, or until direct contact with the claimant insures that the claimant is capable of understanding the denial decision. The required contact could come during development of the case prior to the decision, but the assumption of understanding should be rebuttable.

REHABILITATION EMPHASIS PROJECT

SSA should set up pilots to study the effectiveness of concerted vocational rehabilitation efforts on younger workers. The programs would take into consideration the individual worker's education, training and skills, prior work record and present residual functional capacity, together with present job opportunities and targeted industry outlooks. The programs would guarantee continued benefits and medical assistance on at least a reduced basis for up to three years after the end of the normal trial work period. Pilots would be in both industrial and rural states and in states with both "large" and "small" disabled populations. Financial incentives would be offered to state rehabilitation programs for effective models.

We stand ready to work with the Congress and with the administration. But the problem is growing.

Thank you again for your work in this important area and for the opportunity you have given me to speak here today.

Chairman PICKLE. We thank you for your statement and we're glad to have Mr. Kearney here with you. I appreciate that you have observed that the answer is to pass legislation. A moratorium just leaves everything in limbo again and cures nothing. That's why as tempting as it might be to some people to have a moratorium, that doesn't solve our problem.

I say to you, Governor, we're going to pass this legislation in the House. On Thursday we passed the rule which provides for the consideration of the bill on Tuesday. And, we passed it by an 8-to-1 vote. On Tuesday we're going to give them a dose of the same kind of medicine.

We're going to pass it by a equal vote no matter that they've tossed out this little morsel. It's not going to deter us. I hope, Senator, that you can find some way to advance it in the other side.

Senator PRYOR. Well, I'll just say to my friend, Congressman Pickle, we have a little different makeup in the Senate than you have in the House. We're trying to change that—maybe I shouldn't say that—but at any rate that is the case.

Chairman PICKLE. Well, I continue to have hopes for the Senate.

Let me—at this point, this will take 2 or 3 minutes only I think, but in view of the fact that some of our comments and expressions of what you hope would be in the legislation, it might be well to review for many of you what is in this bill.

Many of you are interested groups and are informed about the legislation. Some of you may not, and in order that we know what's in it let me mention four or five things. This bill, H.R. 3755, which I again say is coauthored by Beryl Anthony, provides basically for four or five of these main things.

First, the first section 101 provides for the continuation of benefits for those individuals who are receiving benefits unless it is shown that there has been medical improvement. We simply are saying to an individual and the administration, you can't take somebody off the roles if they've been called disabled unless you can show medical improvement.

Now, that's not a free for all. There are provisions in there that say that benefits would be terminated if there's new evidence or if there's been improvement in therapy or in health aids to make him able to work. Or, if it was in error or fraudulently established. So, it's not an open invitation that you get on there and stay forever.

But it does provide that you must show medical improvement. It also provides for a study on the evaluation of pain and it requires the Secretary of HHS together with the National Academy of Sciences to conduct a study to determine questions regarding the subjective evidence of pain.

It also says that in determination of disability the Secretary would consider the combined effect of all impairments, not just a single one but if they have multiple impairments that would be a factor to consider.

It also gives a temporary moratorium on mental impairments review, not just functionally psychotic cases as the Secretary had recommended, but all mental impairment cases. The bill provides for face-to-face evidentiary hearings at the State level, hopefully by January lst, 1985.

We eventually envision the fact that we would do away with the reconsideration hearing and ask the individual to bring in their testimony towards the beginning so that they might present evidence and have face-to-face eyeball presentation of their testimony at the beginning of the case and not have to wait 6 or 8 months for the ALJ level.

We think that would be a very definite improvement. The bill provides for the continuation of benefits to the ALJ level. Now, that was added by the Congress last year. That law has now expired. It expired in December. The administration had temporarily suspended these reviews. They started them up again in February, which means that under the present law you can get benefits for that month and the 2 additional months that followed.

On that basis by May 3 people could not get benefits to the ALJ level unless we pass this law or make some correction in the law. So, time is of great essence in seeing that this provision is in there.

We also have a provision that establishes a uniform standard for disability determinations. As you said, Governor, we're trying to say that the hearing examiners would operate from their manual or from a set of standards and likewise the ALJ's would operate from these same standards, still abiding by the Administrative Procedure Act so that the judges have that leeway that they're entitled to have.

But they would try then to be working together under the same regulations. We're trying to stop the practice of having a rule for the hearing examiner and then letting the ALJ 6 months later use an entirely different or separate set or rules. We could put most of these things in regulation, and get a standard uniform approach. That's what we need. It shouldn't be surprising that we have so much differentiation in decisions at this point.

Now, that's what essentially this bill does, although there are many other provisions in it. That's why we think it's a reasonable bill, and very needed. We must have legislation and not have a moratorium. Because moratorium solves nothing.

Now, my only question to you, Governor, is this. You've been selected in Arkansas as a possible Medical Improvement Demonstration State. Will you state to me again what is the status in your negotiation with SSA, and I would say to Mr. Kearney, in the event that you are selected how long would it take you to put it in effect?

So, Mr. Kearney, would you want to comment on that?

STATEMENT OF JULIUS KEARNEY, DIRECTOR, DISABILITY DETERMINATION SERVICE, STATE OF ARKANSAS

Mr. **Kearney**. The question of where we—I think the first part of your question was what is the status of our negotiations. At one time we thought we were about to start putting it into effect. We thought we had an agreement with the Associate Commissioner in Baltimore. We did have an agreement with the Regional Commissioner and her staff in Dallas.

My understanding is it was decided that because other States might like what we're doing in Arkansas, they would hold off and study it more. Not, as I understand it the substance wasn't the problem but rather the effect it might have on other states wanting to do the same.

Of course, our position is if it is something that you buy up on substance then we might ought to buy up on it for all States, then we would be moving toward, again, a national program.

Our suggestion was very similar to the provisions of your legislation which deals with medical improvement. And, that's the only issue we really addressed in our proposal.

Chairman **Pickle**. Well, I can also observe that the recommendations, Governor, which the National Governor's Conference had recommended to us, the Congress, that we include in any legislation, parallels this bill almost exactly.

Governor **Clinton**. Yes; almost exactly.

Chairman **Pickle**. Now, I don't know where we were leading you or you were leading us, but we're leading each other.

Governor **Clinton**. We work together. We work together.

Chairman. Well, we'll let him get the credit, but anyway we are working together in almost exactly as the Governors had recommended. And, so we're pleased with that.

Now, Senator Pryor, do you or Mr. Anthony want to make any comments to the Governor at this point?

Senator PRYOR. Beryl, go ahead and I'll have one in just a moment.

Mr. ANTHONY. Governor, I want to thank you for the position that you've taken. I think you made one statement that the public needs to be keenly aware of. That is that you are in an untenable situation as the Governor of the State of Arkansas. We have a national program that should be run uniformly in 50 States.

We have court decisions in different circuits that have said that this administration is disobeying the intent of Congress, that they have acted capriciously. There have been judgments handed down against them to restrain them from doing certain things. Yet you are responsible for the people who manage the program in the State of Arkansas.

So you really do stand between the Federal Government, who pays for the program, and the people who benefit from the program. And, I guess you're on the firing line. You see it every day. We get the letters and we get the phone calls, and we have to work on the cases too.

Personally I would like to thank you for being willing to speak out. You've done it in a calm way, and you've done it in a compassionate way. I think you've probably done it in an unfair way because you haven't criticized the administration nearly by as harshly as I think they're due criticism.

I think that's more testimony to the fact that you want the program to work. If there's any one thing that I hope comes out of this hearing, it is that we can establish a public record that shows we ought to have some uniformity of the program so that no matter what type of disability you're on or seeking, it'll be applied the same way in whatever jurisdiction that you live in.

I want to thank the Governor for coming in and making that very strong point, Mr. Chairman.

Chairman PICKLE. Thank you, Mr. Anthony. Senator Pryor.

Senator PRYOR. Just let me say that Arkansas would have been proud of Governor Clinton some weeks ago when he came to Washington on behalf of all the 50 Governors and testified before the Senate Finance Committee on this very issue. And, I must say that the staff of the Finance Committee and the various members of the Finance Committee, names I will not mention, had their guns loaded for Governor Clinton that day he testified. I want you to know that Governor Clinton in his statement was eloquent and reasonable and compassionate.

I think he probably won us many votes that morning and he certainly added to the depth of that hearing, and I just want you to know that all of our State, had you been there sitting as I was across the table from him, you would have been as proud of our Governor as I was that morning.

So—I know we've got a lot of other witnesses and I had some questions, but I may submit them for the record if we can hold the record open.

Chairman PICKLE. That'll be permitted, Senator.

Senator PRYOR. Thank you, Governor.

Chairman PICKLE. Thank you. Governor, again, we thank you. We have a rule here that we're trying to establish this morning that the witness would take 5 minutes. You've taken up a little bit more than that, but its extremely important that you be able to make a full statement.

And, your statement has great meaning for us in these hearings, so we are pleased that you would come forward in your busy schedule to be with us. We thank you and we thank Mr. Kearney very much.

Governor CLINTON. Thank you. If I could just say one thing in closing, Mr. Chairman, that I meant to say in my opening remarks. I'm very proud of the people that are back here behind me that are going to testify to you today, and they've carried this ball and been responsible for a lot of what we've said.

Our State owes a great debt of gratitude to our Senator and our Congressman Anthony, but I remember when the first rumblings of the possibility of Federal legislation were raised when I first talked to Beryl Anthony, when I first talked to anybody, everybody said that if Congressman Pickle decides that this is an important issue we can get something done. If he doesn't, we can't. So, I want the people in my State to know that when that bill blows out of the House of Representatives next week we've got a friend in Texas. We don't always agree with Texas on things.

But we appreciate you more than you know. Thank you very much. [Applause.]

Chairman PICKLE. Thank you, Governor. Governor, after that statement I almost wish you well this fall, but not quite that well.

Now, the Chair will ask the following individuals to come forward now for our next panel, Mr. E. Russell Baxter, Dr. Douglas Stevens, and Dr. Payton Kolb. If you gentlemen will come and just take your seat at the witness table we'll proceed.

I'll ask that you proceed in the order that we have you listed. Mr. E. Russell Baxter, will you hold your hand, Mr. Baxter? He is commissioner, Division of Rehabilitation Services, the Department of Human Services, for the State of Arkansas.

Dr. Douglas Stevens is a psychologist, North Little Rock, AR. And, Dr. Payton Kolb, who is a psychiatrist, also from Little Rock.

We're pleased to have you gentlemen. Now, we're going to ask Mr. Baxter if you'll make your statement first and then we'll go to the next two gentlemen, and then we'll throw it open for questions if that is agreeable to you.

So, Mr. Baxter, if you'll proceed—and your entire statement will be made a part of the record.

STATEMENT OF E. RUSSELL BAXTER, COMMISSIONER, DIVISION OF REHABILITATION SERVICES, DEPARTMENT OF HUMAN SERVICES, STATE OF ARKANSAS

Mr. BAXTER. Thank you very much, Mr. Chairman, Senator Pryor, Congressman Anthony.

I appreciate very much the opportunity to give you my perspective today. I represent a State agency that provides rehabilitation services to the physically and/or mentally disabled. I am not one, nor do not represent 1 of the 37 States, however, that administers the disability determination unit.

So I'm coming at you from a little different perspective and, in fact, my major emphasis as a result of that will be on the Beneficiary Rehabilitation Program. I must say I've had to rearrange my thoughts a little since I got here this morning, because I share the extreme feeling, if not fury, from the announcement from the Post.

Only one time previously can I remember anything affecting me that much in terms of the disability program. And, I'll cover that in my last point. I assume now that the Senator from Kansas will say, we've got what we need now—there's no need for further legislation.

I know with the kind of leadership represented here in the chairman, and from Arkansas that every effort will be made to not allow that to happen, that we do have legislation. And, I think I can assure you without question that Arkansas will be in the middle pitching for that legislation.

I'm very proud to support the Governor of the State of Arkansas, who has taken this strong position in terms of disability reform. The entire country knows what impact he's had as they know what Congressman Pickle has had, the people in the rehabilitation field and the Social Security field know what impact the Governor has had in this issue.

So I'm very proud to support and be able to say that this is the position of Arkansas and the Governor for the State of Arkansas.

The three points that I will mention first are related to disability determination, and they're repetitious to you and I'll just take a short time to emphasize them, and then spend a little more time on the Beneficial Rehabilitation Program.

While it's difficult for me to understand the real problems between administration and the procedures of the administration and the law, I can't understand why beneficiary claims that are reviewed can't continue until the final decision is made by an administrative law judge during the appeal process.

This doesn't make sense to me that an individual has earned eligibility for benefits, yet he is denied procedural fairness. Only should the benefits be discontinued if the administrative law judge through his neutrality, through his training, and the expertise that only he presents, should say that the claim should be—that the benefits should be discontinued.

Another point, I can't see why medical—why there can't be a national medical improvement standard. Whether or not there has to be pilot projects in the beginning, I see no reason why there can't be a medical improvement standard.

States have demonstrated in one or two cases already that there can be. This has to be to assure more consistent application, a more thorough case documentation, and an analysis of disability and abilities, including ability to work.

I think 3755 accommodates this. I can't understand, but I'm sure that Dr. Kolb will touch on this much more—I can't understand also why mental impairment cannot be adequately and accurately presented to reflect the abilities of the individual to work.

The current presumptions just do not take into account the total person. They do not take into account, for example, the stressful situations presented many times in competitive work environments, and that has to be considered for many of our mentally ill who want to return to work.

Finally, the other point that I wanted to stress that I approach the point of fury I did this morning is relative to the virtual discontinuation of the Beneficiary Rehabilitation Program. In spite of a proven cost benefit where there was actual savings to the Trust Fund, in spite of huge increases in removals from the roles, in spite of denials that have not occurred previously, funds have been virtually eliminated from the Beneficiary Rehabilitation Program. In 1981, $124 million nationally, as you know, was provided to the States from SSDI trust funds, less than the 1.5 percent of the ceiling allowed. Fifty additional million from general revenues for SSI was also discontinued.

In Arkansas, and let me show you the impact on Arkansas, a relatively small State in terms of population and so on. In 1980, with these funds, Arkansas alone served 2,381 from SSDI funds at a cost of $1½ million.

In 1981, we served 2,189 beneficiaries at a cost of $920,000. For SSI, we served slightly over 1,400 beneficiaries each year with an expenditure in 1981 of $306,000. Now, SSI has been eliminated. We have $10 million nationally for the Beneficiary Rehabilitation Program, but I am convinced even for the $10 million the reimbursement system established by SSA was designed to fail. And, I'm very sincere about that.

Even with SGA, there is a year's delay certainly for reimbursement. But it has been proven already that the delay is much longer, 2 and 3 years for reimbursement. We haven't even approached the $10 million.

Arkansas got $35,000 approximately each year. We haven't been able to touch much of it, even though we've submitted significant claims. It is impossible to fiscally administer such a program. My appeal to you relative to the Beneficiary Rehabilitation Program is to look at that close and to reestablish it as it was prior to the Omnibus Reconciliation Act of 1981.

I think you can accommodate changes with your advisory council on medical aspects to some degree. I'm concerned there though about the delay that that might present because we're in trouble right now. We'll be in trouble next year.

And, I think the medical—the advisory council can come up with appropriate ideas for resources, appropriate service, providers and so on. But unless we can return to the type of program we had when we had a proven cost benefit, when the agencies whether they are public or private, can attempt to rehabilitate without guaranteeing so that we know we can get reimbursement, then it will be difficult to achieve anything.

We have a disincentive now with the long-term recipient of Social Security benefits being scared, literally frightened about losing that, and very hesitant to participate in a rehabilitation program. But we overcome that in many cases.

The agencies now have even a worse disincentive, knowing they are providing services, most of which cannot be reimbursed without any knowledge of when that reimbursement will come. So I appeal to you to look at the Beneficiary Rehabilitation Program and to attempt to give an emphasis at least in the advisory council for this part of the reform package.

Again, I appreciate very much the opportunity to present to you, and I appreciate very much having the chairman in Arkansas in this rehabilitation facility in giving us the opportunity to show you the facility at the same time.

Thank you very much.

[The prepared statement follows:]

STATEMENT OF E. RUSSELL BAXTER, COMMISSIONER, DIVISION OF REHABILITATION SERVICES, STATE OF ARKANSAS

I am Commissioner of the Division of Rehabilitation Services, Department of Human Services. Our Division provides rehabilitation services to physically and/or mentally disabled persons in the State of Arkansas. The agency was established in 1926, operating as a part of the State Department of Education until 1971 and now is a division of the Department of Human Services.

This State has an independent Disability Determination agency, that is responsible to the Governor of the State of Arkansas. The Division of Rehabilitation Services is, therefore, not one of the thirty-seven State Rehabilitation agencies that oversees the administration of the Disability Determination agency. My perspective, therefore, is somewhat different from other Rehabilitation Agency commissioners who might have made presentations to either of the two committees. I, therefore, will place a little more emphasis on the beneficiary rehabilitation programs, particularly SSDI; but also SSI.

The entire problem of Social Security Reform, while obviously a very serious problem, is one that is extremely complex and difficult to understand from my perspective. It is extremely difficult for me to understand, for example, why beneficiaries whose claims are reviewed cannot elect to continue benefits on an interim basis throughout the full hearing process until a decision is rendered by an Administrative Law Judge. It seems reasonable to expect that if there is an appeal process that benefits would be available until that process is completed. How can there be basic procedural fairness for those who had contributed to the Social Security Trust Fund with the expectation that benefits were secure in the event of disability? While I fully support face-to-face hearings, even that does not provide enough protection to claimants and beneficiaries to assure that full and partial reconsideration hearings will occure in all cases. Only the Administrative law Judge who must have significant training and neutrality can provide the expertise necessary to assure full due process before termination of benefits.

The second major problem which I have difficulty understanding is related to medical improvement. To me obviously there must be a national standard. I believe it can be workable. Whether the Miranda medical improvement standard is utilized or some other standard, there is no reason to believe that there cannot be a national standard. This process encourages more thorough and careful case development focused in the individual and their particular medical disabilities in relation to previous diagnoses an symptoms, as well as the individual's ability to work.

There is no reason to believe that the evaluating of mental impairments cannot adequately and accurately reflect the ability of claimants to engage in work. There must be developed and implemented an effective and realistic method of measuring the full range of work skills and behaviors in order to make accurate predictions about an individual's capability for successful work in a non-sheltered, competitive environment. Current presumptions of transferability of skills and unskilled work operate to disqualify a mentally impaired individual, in spite of the fact that to sustain successful job performance many work environments require stressful competition.

As indicated previously, my primary emphasis will be on the beneficiary rehabilitation programs and the remainder of my comments pertain to that.

The most difficult thing to understand about the Social Security program is that while there has been an increased number of individuals removed from the beneficiary roles and a high percentage disallowed for disability claims, the amount of dollars for the rehabilitation of recipients and for those removed from the roles has dwindled to nothing. The amount for Arkansas, for example, has been approximately $35,000 in 1982 and $35,000 in 1983, and it has been impossible to get reimbursement for even a fraction of this amount. While there is an obvious need for Social Security Reform, nothing makes sense in trying to understand the rationale of increasing the numbers removed from Social Security roles and decreasing significantly the dollars to work with those removed from the disability roles as well as to attempt to remove others from disability roles through Rehabilitation programs.

Prior to October 1, 1981, State Rehabilitation Agencies received monies from the SSDI Trust Funds (allocated on a quarterly basis) and from the General Revenues (appropriated by the Congress) for the provision of rehabilitation services to eligible SSDI beneficiaries and SSI recipients. in fiscal year 1981, the State Rehabilitation Agencies received over $124 million to implement these programs, and provide services to over 115,000 benediciaries with mental and/or physical disabilities.

The impact on Arkansas is obvious:

	Number served	Expenditure
1981:		
SSDI	2,189	$920,983
SSI	1,460	306,265
1980:		
SSDI	2,381	1,510,876
SSI	1,499	731,472

The high for Arkansas was 1976 when 2,972 SSDI cases were served with an expenditure of $2,226,434 and 1,720 SSI cases were served with an expenditure of $871,161. The low for Arkansas was 1983, identical to 1984, where we served 60 cases with advanced funding of $35,000 each year. Expenditures from Social Security will be much less than that, however.

Despite the demonstrated cost-effectiveness of these programs the law was changed—as a part of the Omnibus Reconciliation Act of 1981—to provide that State Rehabilitation Agencies would only be reimbursed by the Social Security Administration for the cost of rehabilitation services resulting in the client's participation in Substantial Gainful Activity (SGA) for nine months. While current law does not mandate that payments be made to the states in advance, the SSA for the present time, has chosen to do so. During FY 1983, approximately $10 million was advanced to States, a cut in funding from FY 81 of over 90 percent.

Under present law, states may have to wait two or more years before full reimbursement funds are made available. In addition to the period of nine months of substantial gainful activity, there are also the many months, even years, which are required to successfully rehabilitate a severely disabled person.

Prior to reimbursement, the states incur, and will continue to incur, substantial expenses for services which may significantly exceed the "advance" monies provided by SSA. Because of this, fiscal planning is being severely disrupted, since State Agency administrators are unable to ascertain when or in what amount the reimbursement will be provided for services rendered.

The State has serious misgivings about the provisions and limitation of the current beneficiary rehabilitation programs. It appears from this perspective that the system was designed to fail. Processing of reimbursement claims has been almost impossible, extending well over the end of one and even two fiscal years, makng planning impossible especially since we are not sure whether the advanced monies will be adequate but more importantly because we in no way can anticipate what SSA will approve and what they will not approve.

In conclusion, it seems to me that H.R. 4170 goes a long way in addressing overall Social Security Reform. It is a very good comprehensive Social Security Disability Reform package in addition to improving significantly the BRP. All States are doing whatever possible to improve procedures in this program but obviously there is a limit to the effectiveness of state-by-state efforts to improve a national program. Your leadership, which you have already shown, is urgently needed to change this program so that its standards and procedures are fair to the disabled people it serves, including programs for the rehabilitation of recipients, as well as those disallowed benefits. Fairness that will potentially restore personal dignity where there is potential to re-enter the labor force and to once again contribute to society through this dignity and through the payment of taxes.

Thank you very much for this opportunity to share my perspective on this extremely important topic that affects disabled people in this State and in all States.

Chairman PICKLE. Thank you, Mr. Baxter.

Now, Dr. Douglas Stevens, if you'll proceed, sir.

STATEMENT OF DOUGLAS STEVENS, PSYCHOLOGIST, NORTH LITTLE ROCK, AR

Dr. STEVENS. Mr. Chairman, I'm a clinical psychologist in private practice who works or interacts with this system in a number of ways. In the first role I am a clinical psychologist treating individuals who are disabled as well as evaluating them from an emotional standpoint.

I also have been a rehabilitation counselor and continue to do vocational rehabilitation and vocational evaluations of individuals. I also work as a vocational expert for the Social Security Administration, so I tend to see these individuals throughout the program.

There are a number of things that I could talk about in terms of the inadequacies of the program or the abuses of the program, but I think we're all well aware of those. Those have been quite well documented over time. And, so this morning in these brief moments I might mention some of the areas that I would suggest might be considered. And, I'm delighted to know that legislation is pending in the House.

I certainly concur with all of the remarks made by Governor Clinton, because those kinds of steps forward are very important. At the local level in disability determination we've had a great deal of difficulty, and of course, Mr. Kearney is new in this job and none of the remarks that I make have anything to do with his administration, but rather with problems that we've had in the past years.

In the emotional area we've had an ongoing problem that needs to be corrected. The disability agency has selected particular tests for consultatives, seemingly with an eye toward selecting those tests which would give no information regarding the allegations of disability.

At one point in the past I used to do such evaluations for them, and finally refused to do any more because they would ask for tests that had nothing to do with what the claimant said was wrong. I then started writing into my evaluation the fact that these test results had nothing to do with the kinds of complaints of the claimant.

At that point I was called and reprimanded. I responded that I would continue so commenting as long as I was asked to do tests that had nothing to do with the situation.

Chairman PICKLE. Who called you? Who called and reprimanded you?

Dr. STEVENS. It was one of the——

Chairman PICKLE. SSA?

Dr. STEVENS. No, the disability determination people who send out purchase orders for consultative examinations. Another situation developed with mental retardation when SSI came under the system. There were thousands of people who needed to be evaluated for mental retardation under SSI. I was doing something like 8 or 10 evaluations a week, and 80 to 90 percent of them fit the guidelines. Suddenly the testing was terminated. When I made contact with the State agency I was told that so many people were turning up disabled under the testing program that they decided they would use general practitioners. They could give an eyeball evaluation of mental adequacy, thereby avoiding payments to those individuals who were actually mentally retarded.

Senator **Pryor**. Did you feel at that time that they were trying to take—that they had basically a quota system that they were using to take certain percentages or certain numbers from the roles? Could you establish that?

Dr. **Stevens**. Senator, I had no indication of any quota. I just knew that they felt they were being overwhelmed by people who were eligible and wanted to cut down the number of eligibilities.

Chairman **Pickle**. Senator, we'll ask that of the ALJ's—that may be——

Senator **Pryor**. Good.

Dr. **Stevens**. The medical improvement considerations are so important for the future. Many people have been intimidated in the last few years with the cessation letter. The people believe somebody actually knows something about them that they don't know. They get the report saying, "We have information to indicate that your condition has improved and you're now ready to return to substantial gainful activity."

They come to my office wondering if someone has been spying on them. The people who are less educated, less sophisticated, actually believe that the Federal Government knows something that they don't know about themselves. And, they really believe the letter. Many of these individuals, unless hand carried through the process, will stop the application procedure at that point.

I support all of the things that have so far been mentioned in the bill. I would mention a couple of other things for consideration. One of the concerns that I have is that contingencies be studied for helping individuals return to employment.

There are numerous individuals who come in in a fairly acute situation. Yet, one might expect that 2 or 3 years down the road, their condition has a good chance of improving to the point that they could return to employment.

However, with benefits simply being awarded, the individual receives a positive reinforcer for continuing the disability, unless there is some contingent program where they can be assisted gradually to move back to productivity.

This can be through the State rehabilitation agency or it can be through private sources. I think there are a lot of possibilities for contingently looking at this.

A second concern that relates to this same area: Some individuals will physically, after being disabled for some years, reattain the capacity for going back to work. But they have become so deconditioned, spending much of the time in a recumbent position, that even if the condition for which they were impaired goes away, they are now deconditioned to a point that they couldn't possibly be on their feet for more than 3 hours a day.

We need some system for moving them back in a stepwise fashion, perhaps through sheltered workshops, perhaps through vocational rehabilitation, but gradually helping them to increase their tolerances until they can tolerate 8 hours a day.

A third area that I'm particularly interested in is the emotional problems of individuals. This involves the listing the Secretary has called the "functional nonpsychotic disorders." Many individuals are disabled under this category. And yet, as compared with cardiac, back problems, and others, they have a higher probability for rehabilitation than many of the deteriorative conditions.

The treatment funds available under medicare for emotional conditions, despite the higher possibility of getting them back to work, are so limited that they can't possibly afford the treatment. Because of this situation, I would estimate that at least 90 percent of individuals disabled due to mental reasons and drawing social security as their primary source of income, are not getting any treatment. They are not getting the help that could return them to productivity.

It's been mentioned in your bill and the Governor's comments that more attention is being paid to the interactive process of these problems and ways we can help get folks back to work. I think any evaluations that directly relate to the capacity of the individual in the work force, work simulation testing for example, is going to be very helpful in the future in correctly assessing potential and capacity.

Any way that I can assist at the local level or in planning for mental health I would be happy to do. I appreciate this opportunity.

Chairman PICKLE. Thank you, Dr. Stevens. Now, Dr. Kolb—let me, before you proceed ask can the audience hear the people as they are making statements? Can you hear back there? Some can and some cannot.

Dr. Kolb, if you'll get the microphones as close to you as you can I think that would be helpful.

STATEMENT OF PAYTON KOLB, M.D., PSYCHIATRIST, LITTLE ROCK, AR

Dr. KOLB. Mr. Chairman, I appreciate very much this opportunity to come, and Senator Pryor. I'm the Arkansas legislative representative of the American Psychiatric Association, and I work with an old friend of yours. I know Mr. Jay Cutler who used to be on Senator Javitt's staff, and much of the material I have is from a statement made to the Senate Finance Committee in January by Dr. Meyerson, which is the official position statement of the American Psychiatric Association. It's very lengthy and I certainly am not going to read that, but I would like to touch a few high points on that and copies have been made this morning to give to you all and to put in your particular record.

I've also been a consultant to the Bureau of Hearings and Appeals for a number of years. I would like to just touch on a few experiences that I've had with this. Certainly the APA and all of us are in support of H.R. 3755 because it does, as you pointed out, bring in many of the changes that we would certainly like to see in the program for the benefit of the beneficiary.

We agree, of course, that a periodic review is necessary because there are people who do become able to go back to work. And, these need to be pointed out, but it needs to be done on a consistent and a fair and a medically feasible policy, rather than what has been done in the past.

Briefly, our records indicate that about 40 percent of the 1,134,000 people who have been reviewed and terminated at the initial review level. Of these about two-thirds have been reinstated. You probably know these figures already.

From the sampling of 40 recipients who were on disability for mental impairments that were terminated, 27 of these 40 were found to be unable to function in daily living without a good deal of support and could not work in a competitive or stressful environment. The remaining 13 were terminated on really inadequate data.

The records reveal unwarranted termination based on overly restrictive interpretation of the criteria which defines mental impairment, inappropriate assessment of the individual's daily activity, inadequate development and use of medical evidence and a lack of sufficient psychiatric resources in the DDS.

As a consultant to the Bureau I've seen an enormous increase in the last 18 months in a number of cases that have been sent in for review. I found that on the average it requires 4 to 6 hours to review a case adequately. The work load has increased to the point that I can no longer see all the cases that have been sent to me.

From reading many of the cases and reading the termination reports I suspect the termination decisions are made with inadequate study of the record. I am not blaming anyone individual but believe the system as being administered now is forcing quick decisions without adequate review. And, there's also obvious pressure for massive terminations.

Many cases I've seen, as Dr. Stevens' has brought out——

Chairman PICKLE. Let me interrupt you. You just said there would be massive pressures for termination.

Dr. KOLB. This is a belief. I have no adequate evidence to prove this, but the number of cases we have see in the last 2 or 3 years as compared to—I've been on this for a number of years and it's really obvious what's going on from that particular standpoint. That there are massive terminations from this.

As Dr. Stevens brought out we see people who have been on disability for many, many years, and as he very well pointed out here—I won't go into detail on these, but these people become so firmly fixed in the unconscious on this that the only way to get them back to work is a reentry program that is not being done. These people are just cut off.

I might throw in here an interesting conversation I had with an administrative law judge to the question that maybe with many of these people we ought to have a statute of limitations. That is if they've been on disability say 12, 15 years, that really you're not going to be able to get them back. It would possibly be less expensive to keep them on with the statute of limitations rather than try to go through a reevaluation process.

Chairman PICKLE. Dr. Kolb, that recommendation was made originally as a part of the legislation, if you had been on for a number of years or you're a certain age, as an effort to try to compromise with the administration. We removed that and asked for a study be made of that, which may come up later for consideration. So, we're very mindful that's a basis for consideration.

Dr. **Kolb**. As I said this is an interesting question to look at from that standpoint. Another interesting point is an individual with a severe neurosis who, on a given day may look very well, and at a day of an appeal hearing or even in an interview may look very emotionally stable, but when gotten onto a job situation is not able to work on a full day, and cannot tolerate stress of any kind of a job at that point.

Here brings up the point that we feel is neglected so much, and that is that not a complete study of this whole life pattern of this particular individual is being done. I might say yesterday I received a copy of Psychiatric News, which is our official newspaper, and an excellent study was done in California pointing up that in many instances with physical disabilities, psychiatrists were brought in too late. We then find that a complete family history pattern is not brought out.

And, from this standpoint they found very interesting situations that revealed a different approach to try and help this person than to terminate them from disability because they looked like they were doing pretty well at this time.

Another problem involves the practice of having a second opinion process examination. We think this can be good but you have to take into consideration the person doing the second examination must take into consideration the whole life pattern and the whole record, which is not being done.

And, this is another recommendation that we have. We do admit there are frequently inadequate medical reports that we receive and the APA is working very strongly to teach all of us how to really do an adequate examination that the people who make these decisions can work from and go from there.

We are also very concerned that the criteria that we use is very inadequate and glad to report that the APA is working very strongly on this, and have been told and have worked with SSA to the point that we hope this can be changed. These are the listing of impairments—in section 12, regulations 4, subpart P, with which you all may be familiar.

We're concerned that, of course, only individuals who are actually disabled come under the Program. We do see in private practice many times individuals who feel because they're nervous and a little tired that they are not able to work.

But in these situations work itself is a therapeutic process. And, here again the criteria needs very definitely to be changed and we hope that SSA will work with us fairly closely in this.

One other situation that I don't know that Congress can do much with, that I've run into, is the problem where an individual is not functioning fully on his job, and this occurs mostly with the big industries. He's put on extended leave or pushed into early retirement, and then the pressure is put on him to "get on social security." This puts the individual in an extremely frustrating situation and it—makes me rather angry at big industry and some of the things they're trying to do with this.

The individual, of course, many times is not actually disabled as far as social security criteria is concerned, but he doesn't know which way to turn. He doesn't know what his company is going to do to him. Many times he doesn't want the full disability and just wants to go back to work. But that's a little different situation.

As I indicated we feel that H.R. 3755 can be a great deal of help to us on this. One other thing that I would like to point out is that there has been some communication between the APA and SSA on the use of our Peer Review Program for validation of many of these medical reports.

We have developed an excellent Peer Review Department in our headquarters in Washington. We started out to work with CHAMPUS to help with their Peer Review. It has been so successful that many of the private insurance companies are now using it and are very grateful that we have this. We are certainly perfectly willing to make this available to SSA and use it with them, because we think it's an extremely effective source of work and can help with the Peer Review process.

In general that is our position and my time is up. We certainly support your legislation from the national standpoint and from the State standpoint. We hope to see this go through, and be able to help with this.

Chairman PICKLE. Dr. Kolb, I thank you and the panel. Let me just point out to you that along the lines that we are trying to take action in this bill, it at least in general corrects or addresses some of the matters you've mentioned.

I appreciate the suggestions you made. A lot of them we might be able to do in this bill and some we can't. But it's good to have these suggestions from you and I appreciate that you would make them. I want to point out by way of summation, again, that in this bill, section 201 provides for temporary moratorium on mental impairment cases. That is, a temporary delay on all mental impairment cases until the listings for mental impairments have been revised in consultation with the advisory council, in a published and final form.

Then we also get over to section 304 which is the advisory council on the medical aspects of disability. It creates an advisory council composed of independent medical and vocational experts to provide advice and recommendations in this area.

We think that will be very helpful and it includes that at least one psychiatrist, one rehabilitation psychologist, and one medical social worker will be a part of that advisory council. So we think we are going generally in the direction that you recommended on this thing.

So, I want to thank all of you for your statements and your testimony.

Do either Senator Pryor or Mr. Anthony have any questions?

Senator PRYOR. Congressman, I have one question for Dr. Kolb and I'd like to just draw our attention a moment to two court cases. I think Dr. Kolb may be familiar with these and perhaps our other two witnesses this morning.

One of those cases was in the State of Minnesota, the other case the State of New York, and in both of these cases Social Security Administration was found guilty of implementing an illegal policy that discriminated against the mentally disabled.

Now, do you feel that in the States that we have been forced to follow review procedures that are unfair to the mentally ill?

Dr. **Kolb**. Yes, very definitely.

Senator **Pryor**. And, do you feel that the legislation offered by Congressman Pickle and Congressman Anthony would address this particular point to make certain that we were not further forced into this situation?

Dr. **Kolb**. Yes, the American Psychiatric Association is very hopeful that this can go through for this particular reason. Now certainly when we're dealing with mental impairments there are many variations, and I'm sure that amendments might be necessary down the road.

But I think this certainly would correct many of the problems that we have at this time.

Senator **Pryor**. Well, it is my understanding also that the American Psychiatric Association, which you are such an eloquent spokesman for, has participated in a work group with the SSA to rewrite the regulations applicable to the evaluation of mental impairments.

Dr. **Kolb**. That's correct. That's in Dr. Meyerson's statement too.

Senator **Pryor**. And, so basically the outcome of this study I can only assume, would be implemented by the Pickle legislation. Now, it wouldn't be embodied in a moratorium though, would it?

Dr. **Kolb**. No, it wouldn't.

Senator **Pryor**. If we just had a moratorium that would not accomplish the needed results. And, this is the sort of information we need to take back to Washington, especially next week on the eve of bringing Congressman Pickle's bill up in the House. And I would just like to say, to Dr. Kolb and to our other witnesses how very appreciative we are of you being here with us this morning.

Dr. **Kolb**. We hope—I was looking at your opening statement about the Acting Commissioner and the question in Dr. Meyerson's statement—he quotes Ms. Heckler in saying, "We have no reason to believe that there have been any unjust findings." And, this bothers us.

Senator **Pryor**. Well, it bothers us too. And, I might also make that point again. I don't know if I stressed it enough in my opening statement. At this point we do not have a Director or an Administrator of the Social Security Administration. We have an Acting Commissioner, not a Commissioner but an Acting Commissioner.

That has mystified me as to why a permanent Administrator, I should say, has not been appointed, and I don't know what this means exactly except a lack of committment and the idea that maybe through confusion they can accomplish more than they can through clarity.

Dr. **Kolb**. We're ready to help if they are.

Chairman **Pickle**. Mr. Baxter, Congressman Anthony has asked me to present this question to you. He's been called to the telephone on an emergency matter and wanted to be sure this question was asked. So this is Congressman Anthony's question to you.

He says you have worked in rehabilitation for many years and you are our State expert. In your opinion what are the greatest problems in rehabilitating claimants who have been on disability for years and then suddenly told they can work?

Mr. **Baxter**. Well, the greatest problem right now is a lack of funds or an absence of funds to provide the type of services, counseling as much as anything else, but in many cases retraining and some forms of physical restoration to allow them to regain their ability and regain their personal integrity and dignity through employment.

Chairman **Pickle**. Are you able to give them adequate counseling now?

Mr. **Baxter**. Absolutely not. We have—our services have—well, in terms of staff for example, in the last 4 years we have eliminated something like 250 staff members. It was basically because of the loss of SSDI trust funds and SSI general revenue funds.

That has put us in a position of a counselor in regular type cases, not recipient cases, to try to manage 200 cases at one time. That's impossible. And, then when you try to add counseling services to the beneficiaries or to those that might become employable there's no time.

Only with additional staff, which would take additional funds, and we wouldn't have to provide the services but the staff could provide counseling and arrange for services through public or private agencies.

Chairman **Pickle**. I think you mentioned a point where perhaps this measure could be strengthened and we touched on this but not as adequately as perhaps we need to. So, I'm glad you mentioned that. We might make further improvements as we go along on this bill.

Mr. **Baxter**. I think it's possible, especially through the advisory council.

Chairman **Pickle**. I see. All right. Well, I thank you for coming and I appreciate your testimony and I'm glad to have all the suggestions, and to say that we're hopeful we can incorporate some of them. I hope that we can retain the funds, Mr. Baxter, in these rehabilitation services that the administration has recommended to be cut. I hope we can add to them.

So, thank you all very much for your testimony.

Senator **Pryor**. Mr. Chairman, before the witnesses leave, are we going to adopt a rule of leaving the record open for a period of some days so that we might submit questions?

Chairman **Pickle**. Yes, the Chair will so rule, Senator. Thank you for mentioning that.

Senator **Pryor**. Good. And, we might also forward some questions on what we think would help complete the hearing, because we know of the shortage of time. We're very appreciative.

[Dr. Kolb submitted the following:]

STATEMENT OF ARTHUR T. MEYERSON, M.D., AMERICAN PSYCHIATRIC ASSOCIATION [1]

Mr. Chairman, and members of the Committee, my name is Arthur T. Meyerson, M.D. I am Associate Professor and Vice Chairman of the Department of Psychiatry at Mount Sinai Medical School and Clinical Director for Psychiatry at the Mount Sinai Hospital.

On behalf of the American Psyciatric Association, a medical specialty society representing over 28,000 psychiatrists nationwide, and as chairman of both the APA's Committee on Rehabilitation and its Task Force on Social Security Disability Insurance, I am pleased to present to the Committee our views and concerns regarding the Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) programs.

We shared this concern before this Committee two years ago, and reiterated it upon two other occasions at House and Senate Committee hearings. On each of those occasions, we recommended statutory changes which we believed, and still believe are necessary to assure that the SSDI program operates in the most medically appropriate fashion. Many of those changes are embodied in either H.R. 3755 (now Title IX of H.R. 4170) or S. 476, or both. Both bills have our endorsement as well as that of other concerned organizations and individuals.

The APA continues to be very much aware that periodic review of disability cases, whether on the SSDI or SSI rolls, is necessary not only to reduce fraud and abuse, but also to confirm that SSDI/SSI beneficiaries continue to meet eligibility requirements and remain unable to work. The GAO report which prompted the 1980 Social Security Disability Amendments found that perhaps 20 percent of those then on the SSDI rolls were probably not eligible for such benefits. In other words, the system of standards and guidelines and the process of evaluating medical evidence was allowing too many "false positives" into the system at the time of the GAO report. Regrettably, the Administration's approach to this problem focused on reducing Federal expenditures, rather than ensuring a policy consistent with both the letter and the spirit of the careful review mandated by those 1980 amendments.

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[1] This statement was previously prepared for testimony before the Senate Finance Committee on Jan. 25, 1984.

Since the accelerated reviews began in 1981, approximately 421,000 or nearly 40% of the 1,134,000 persons reviewed have been terminated because they were found not to be disabled at the initial review level. Of those appealing their terminations, about two thirds have been reinstated. Most telling in the case of the mentally impaired was a 1983 GAO study that found that 27 of 40 sampled terminations of individuals with mental impairments reviewed by GAO were individuals who could not function in their daily living without a good deal of support and could not work in a competitive or stressful environment. The remaining thirteen cases, GAO found, had been terminated based on "inadequate data." The GAO stated that the unwarranted terminations stemmed from SSA's overly restrictive interpretation of the criteria defining mental disability, inappropriate assessment of individual's daily activities, inadequate development and use of medical evidence and a lack of sufficient psychiatric resources in the DDS. In other words, just three years after the GAO report criticizing the SSDI program for allowing too many "false positives" into the system, the GAO found that there were too many "false negatives" in the system of accelerated reviews, particularly among the mentally impaired.

Taken together, these figures bear out our concern that the SSA reviews, both in terms of their actual conduct and the policy underlying them, have been undertaken in a manner contrary to sound medical practice and sound professional clinical practice. Not only is the program administratively confusing and awkward for the beneficiaries, physicians, health and mental health professionals, state officials and judges involved with it, but it works a special hardship upon the mentally ill SSDI beneficiaries who, by virtue of their illness itself, are particularly vulnerable.

We share SSA's concerns and those of this Committee that the SSDI program must survive between the twin concerns of unwarranted disability payment (and the loss of Federal revenues it engenders) and inappropriate termination of thousands of legitimate beneficiaries (and the costs it engenders in the conduct of appeals proceedings, in expenditure of state and county welfare and service funds and worst, in human coin). We believe, however, that H.R. 3755 and S. 476 propose responsible, fiscally prudent solutions to these problems to the benefit of legitimate SSDI beneficiaries and ultimately to the continuing integrity of the SSDI program itself.

Our concerns were first expressed almost two years ago by the APA in a letter to then Secretary Schweiker, then in testimony before the Senate Finance Committee, in more recent testimony before the Senate Special Committee on Aging and House Ways and Means Committee and in comments in 1982 on proposed revisions to the so-called "medical listings," the SSA's regulations regarding the determination of disability based on medical criteria alone.

Further, since our communication with Secretary Schweiker, we have met on numerous occasions with SSA officials, both formally and informally, regarding our concerns. This summer, for example, the APA, along with other professional organizations, joined with the SSA in an effort to rewrite the regulations surrounding mental disability under the program (section 12.00 of the "listing of impairments"). That activity, which continues as I testify, has met with significant agreement about the inadequacy of current medical listings for mental impairment and equally significant reworking and updating of the mental impairment listing. While certain that the recommended changes reflect the current state of the psychiatric knowledge and evaluation -- based on sound medical practice -- we are not certain that these thoroughly considered and carefully developed regulatory changes will be accepted as final regulations. More recently, in fact in the past three weeks, we received a proposal request from SSA regarding the use of the APA's peer review system for validation and assessment of SSDI decision making in the mental impairment field. That proposal, as members of this Committee may recall, was first proposed last April when SSA appeared before the Senate Special Committee on Aging. Our response to the proposal request was submitted this past Monday. We hope it will be entertained positively.

Notwithstanding our efforts to work with SSA both on the medical aspects of impairment and on the use of psychiatric peer review as an independent check on SSDI decision-making, many of the concerns we have expressed in the past persist. We were gratified by a number of Secretary Heckler's proposed changes in the SSDI program in June, 1983, and were equally gratified by her decision to impose a moratorium on disability terminations during the month of December and into the start of this year. However, we remain cognizant of her June comment that "we (SSA) have no reason to believe that there have been any unjust findings" in the SSDI determination process, and remain disturbed about the implications of that statement for future evaluation of those cases which are either yet to be decided or which will be subject to reevaluation. We still believe the SSDI process to be fraught with problems -- some related to the determination process per se, some related to the standards underlying the review (some of which have varied over time based strictly on the adjudicative climate under which they are enforced) and others related to personnel issues.

In our considered judgment, legislation now pending before the House (H.R. 3755) and before this Committee (S. 476 and S. 2002) represent serious and responsible means of recodifying current SSDI law (and similarly, SSI law) to assure that both fraud and abuse are eliminated from the SSDI and SSI rolls, and at the same time provide protection for those who should remain on or be placed on the rolls. The legislation addresses such issues as:

-- accurate assessment of a person's ability to work;

-- whether a person's medical condition had improved;

-- the use of appropriate personnel to make informed medical decisions regarding both a person's impairment and disability;

-- the need to update and improve existing medical criteria for the assessment of disability before further reviews are conducted;

-- the provision of a face-to-face meeting at the initial stages of the disability review process;

-- appropriate assessment of multiple impairments and psychogenic pain;

-- a statutory and regulatory based set of uniform standards by which claimants are adjudicated at all levels of review.

Others testifying at this hearing will address some of these issues, and will certainly address others which I have not identified. As a representative of the APA, I would like to address some of the process, standards and personnel issues with which I am particularly familiar, with which the APA and others have grappled for some time, and which are most directly related to the medical assessment of impairment and determination of disability.

REGULATIONS/STANDARDS

As a physician, I am most seriously concerned with the proper interpretation of medical history in establishing a finding of disability. I am concerned about the accurate and complete development of that medical history, its interpretation into a statement regarding levels of impairment, and its ultimate relationship to a finding of disability. The APA, as a medical organization, has similar concerns. It was because of these concerns as they relate to the SSDI program and our belief that current medical understanding has yet to be applied to the medical and vocational assessment process under the SSDI program, that we recommended adoption of a moratorium on Continuing Disability Investigations for the mentally impaired. Such a moratorium would continue pending: a thorough rewrite of SSA's regulations surrounding mental impairment, and a reconsideration and redevelopment of how vocational capacity is assessed for the mentally impaired. Our efforts with SSA hold out hope that the "listings" for mental impairment will be upgraded to current medical standards in the near future. We understand assessment of how better to handle vocational capacity (RFC) is also ongoing. Unfortunately, we are concerned that OMB cost concerns may yet take precedence over the best medical advice and that our efforts may be frustrated. Hence, we still believe a full moratorium to be necessary. I will detail our reasons for continuing in our concern in these two areas hereafter.

The APA has taken internal action to help assure that APA members understand how to provide full and necessary information in a medical history for the proper conduct of SSDI reviews (whether CDIs or initial claims). Our Board of Trustees approved for publication a document (copy appended) for our members providing guidance on how best to provide case history material for SSDI and SSI reviews -- what facts to include, whether judgments are relevant, when to amplify by example a particular medical point to assure clarity. Further, in conjunction with the President's Committee on Employment of the Handicapped, we are preparing a conference on medical aspects of SSDI.

As we better educate our own members about the process and the nature of the reports requested of them by SSA, we are concerned that SSA is not educated to the flaws in its own standards -- its regulations and policy interpretations -- some of which have not been revised in almost a decade, and some of which have been revised to the detriment of claimants in today's adjudicative climate. Yet, these regulations and policy interpretations form the basis for the interpretation of that medical history into a finding of disability, and the subsequent decision regarding disability.

I would like to address several of these in turn.

MEDICAL IMPROVEMENT

Since 1979, the Social Security Administration has formally taken the position that disabled beneficiaries must establish that they continue to be disabled under the standards currently in use by the SSA. Under this approach, benefits can be terminated even if there is no evidence of medical improvement and, in many cases, even if the person's condition has actually deteriorated since the original determination of disability. No use is made of medical or other documentation which is over one year old. Thus, an individual who has been on the rolls for several years is treated the same as a new applicant. No weight is given to the original determination of disability, even though it was valid at the time rendered. While as many as 20 court decisions have required the Secretary to continue benefits unless there is evidence that the person has medically improved or that the original decision was clearly erroneous (the most recent, a mere three weeks ago) SSA, relying upon its non-acquiescence policy (also addressed in both bills before this Committee) has refused to apply this standard.

From a medical perspective, a medical improvement standard makes excellent sense. It assures that a full longitudinal look is taken at a patient's case history, and that there is substantial evidence contained in that record to justify a determination that the patient is no longer disabled. This is especially true for those suffering from mental impairments which are frequently subject to fluctuation or periodic remission. A single temporary fluctuation away from a profound psychosis, then, would not be sufficient to terminate such a beneficiary whose condition is in remission and therefore found to be "not severe" at the time of the review.

Further, a medical improvement standard which requires substantial evidence prior to termination assures that a physician's note that his patient had improved at a particular point in time will be reviewed against the patient's full record. Certainly there are instances in psychiatry where a physician would indicate that his patient had improved, yet when taken in conjunction with the prior history, it would show that the physician meant that the patient who previously had hallucinated for eighteen hours of the day, now only hallucinates for sixteen. That is improvement, but not necessarily of sufficient magnitude to permit a person to perform substantial gainful activity. For that reason, we believe that the inclusion of a medical improvement standard which requires both substantial evidence and a finding that 'improvement' indicates an ability to work is critical.

This standard is medically sound from yet another perspective. It assures that if patient has benefitted from new medical techniques or technology which has allowed his or her previously disabling condition no longer to be disabling, he or she may be dropped from the rolls.

Coupled with the requirement that SSA consider the complete medical and vocational history, including all evidence in the file from prior evaluations, and develop a complete medical history of the beneficiary covering at least the preceeding twelve months, we believe a medical improvement standard will help assure that the intermittent and fluctuating nature of mental illness will not be used to the beneficiary's detriment in determining whether or not he should remain on the SSDI/SSI rolls. AS GAO noted in a 1982 report, "While the need for current evidence is obvious, we also believe there is a need for a historical perspective in these CDI cases. Many of these individuals coming under review have been receiving benefits for several years. To base a decision only on the recent examination ... could give a false reading of that person's condition. This is especially true for those impairments subject to fluctuation or periodic remission, such as mental impairments."

The House Ways and means Committee Report notes that:

> "The committee recognizes that the problems with the current review have arisen, at least in part, because the criteria for termination of benefits as a result of review were left unstated in the law. SSA has therefore had wide discretion to apply whatever standards it deemed appropriate -- and since the standards of the current program apparently are stricter than those in the past, applying today's standards has meant eliminating benefits for many more beneficiaries than was anticipated when the 1980 Amendments were enacted."

We believe the establishment of a statutory standard -- with the caveats provided in the Pickle legislation -- will help accomplish two separate goals. First, it will help assure that appropriate decision making occurs in the five-step sequential evaluation of disability, particularly in the telling second step when those suffering from "non-severe" impairments (based on current interpretation of such phrase) are dropped from further consideration under the program and dropped from or not added to the rolls. Second, it will help immeasurably in mooting the issue of "adjudicative climate." Whether the intent is to add to the rolls or purge the rolls, claimants will be judged by ongoing statutory criteria.

MULTIPLE IMPAIRMENTS/PAIN

Under current law, the first step in the sequential evaluation process through which the disability determination is made is to determine whether the applicant has a severe impairment. If SSA determines the claimant's impairment is not severe, the consideration of the claim ends at that point. In cases where a person has several impairments, SSA regulations on unrelated impairments state "We will consider the combined effect of unrelated impairments only if all are severe and expected to last twelve months" (20 C.F.R. 404.1522) (emphasis added). Thus, the only time multiple impairments are actually cumulated is in cases in which an individual suffering from a constellation of severe impairments does not meet or equal the medical listings for any one of those severe impairments. According to the regulations, if not practice, cumulation of impairments occurs in assessing residual functional capacity only, and only when all of the impairments to be considered are severe.

This does not represent a realistic policy with respect to persons with several impairments which may in many cases interact and effectively eliminate a person's ability to work. While, as the House Ways and Means Committee noted "it is clear that the determination of disability must be based on the existence of a medically determinable impairment, there are plainly many cases where the total effect of a number of different conditions can safely be characterized as disabling, even if each by itself would not be." The effect of multiple impairments can vary substantially from individual to individual depending on the impairments involved and vocational factors such as age, education and work experience. Thus, case-by-case examinations are essential in this area.

The legislation pending before the House and before this Committee require that SSA consider the combined effect of all the individual's impairments without regard to whether any individual impairment considered separately would be considered severe. We urge adoption of this recommendation as the most appropriate means of assuring that medical impairments are appropriately judged in the disability process.

Another medical area of serious concern to the APA relates to pain. The Social Security statute currently provides no guidance on the use of allegations of pain by the claimant in the disability determination process. Because the definition of disability states that inability to work must be "by reason of a medically determinable impairment," the SSA has allowed pain to be considered only if a specific physical impairment exists to which the pain can be reasonably attributed, through diagnostic techniques and laboratory justification of the cause of the pain. What such provision does, however, is exclude what is known as psychogenic pain, pain with no demonstrable physical cause, yet pain just the same.

A provision in S. 476 would require SSA to consider in the determination process the level of impairment inflicted by pain whether or not a clinical cause of such pain could be established. It does not rely upon a claimant's allegations, however. Rather it relies upon medical findings that prove the pain does in fact exist and impose limitations upon the claimant. In our work with SSA to develop more reasoned medical impairment regulations, we have agreed to include somatoform disorders, characterized by physical symptoms for which there are no demonstrable organic findings or known physiological mechanisms. These disorders include psychogenic pain, a matter of particular concern within several of the regional offices of SSA itself.

Adoption of this provision of S. 476 would be consistent with the collective recommendations of the work group now developing these new medical listings for mental impairment.

MEDICAL LISTINGS/RESIDUAL FUNCTIONAL CAPACITY/WORK EVALUATIONS

The Medical Listings -- or Listing of Impairments already mentioned in this testimony -- is a list of conditions, signs and symptoms which are deemed by the Secretary to be so severe that their presence alone, without further evidence of inability to work, justifies a finding that an individual is entitled to disability benefits. If someone "meets or equals" the listings, he is held to be per se disabled. If he does not, the law requires that capacity to work be examined. I will discuss these in turn.

Two years ago, the SSA republished the Listings in draft form for public comment. Regrettably, the draft made no substantive changes in the mental impairment section, notwithstanding the publication over two years before of a new Diagnostic and Statistical Manual of Mental Disorders (DSM-III) which sets forth current psychiatric nomenclature. Thus, the terminology utilized in the Listings today bears little resemblance to the nomenclature utilized in medical case histories of mentally ill SSDI recipients. SSA state claims examiners, in effect, are forced to "translate" case record statements to language contained in the regulations and POMs before they can begin the evaluation process. Since they are not trained in the psychiatric nomenclature, such translation is difficult if not impossible. Thus, case histories which are wholly complete may be found to be insufficient based on the discrepancies in terminology utilized. The only safeguard could be the professional medical staff in the state agency, but many are not trained psychiatrists and are therefore not current on DSM-III nomenclature.

The draft regulations posed yet other problems in their construction. The APA commented to SSA on the precise changes we recommended in the Medical Listings. These included: changes in the requirement that certain signs and symptoms be manifest at the time of the evaluation -- not necessarily the case in most forms of mental illness which is characterized by intermittent persistence (Part A) -- and a modification in the impairments which, in combination with the signs and symptoms, form the basis for a determination of medical disability (Part B).

Notwithstanding our comments, the regulations were not altered. Since the increased publicity surrounding the SSDI issue, SSA has reached out to the APA and other organizations and individuals for help, as noted earlier in this testimony. We hope these efforts will resolve these per se regulatory problems with the evaluation of psychiatric impairment.

The essential function of the medical listings is to help segregate the population into two categories: those so medically impaired (meeting or equalling the listings) as to be disabled based on medical factors alone; and those severely impaired persons for whom further assessment or residual functional capacity (RFC or ability to perform substantial gainful employment) and vocational factors is necessary to ascertain disability. Regrettably, until late in 1982, as the result of a sweeping court decision, SSA policy had been to "deem" those mentally ill who do not meet or equal the Listings to be able to perform unskilled labor.

On January 25, 1982, the Regional Medical Advisor for the Chicago Region, Dr. Sandor Berendi, wrote that it is "practically impossible to meet the Listing.... for any individual whose thought processes are not completely disorganized, is not blatantly psychotic, or is not having a psychiatric emergency requiring immediate hospitalization...." Dr. Berendi, noted that "....In fact an individual may be commitable due to mental illness according to the State's Mental Health Codes and yet found capable of 'unskilled work' utilizing our disability standards...."

SSA's policy of utilizing the Listings as a means of ability to work has been halted in the Chicago region as the result of the Minnesota suit. A Federal District Court Judge in New York has just held for the plaintiff in a similar class action brought by the City and State of New York on behalf of the mentally impaired in that state. SSA, in the wake of the first decision, halted its practice across the nation, though only through class action or reexamination of all mental impairment terminations since March 1981 will those persons who were terminated from the rolls be identified and reinstated.

It has been found by both Courts that there are factors which more reliably predict whether a chronic mental patient can work. Where work is not obviously precluded by severe symptoms or other factors, analysis of recent prior work history, analysis of the reaction of the patient to stressful situations, and evaluation in a work setting or work-like setting can identify mentally impaired persons who, as a result of their illness, cannot work.

Yet, SSA resists the establishment of a better test of residual functional capacity. We do not argue with the criteria which have been established by SSA for evaluating capacity to work. We are, however, concerned that SSA has not articulated techniques for evaluating an individual's capacity to work against these criteria. The criteria alone do not permit adequate response. Capacity to work must be viewed within the context of present illness and treatment. A work-like evaluation can assess whether the skills a person was able to perform in the past when employed either can still be performed or that other work can be performed.

SSA has argued against workshop or work-like evaluations on the basis of cost. However, I would suggest that assessing whether a psychiatric patient has the capacity to work -- to be either denied SSDI/SSI or terminated from the SSDI/SSI rolls -- should not cost substantially more (and probably would be less) than some of the cardiac-pulmonary assessments required by SSDI for heart disease. If you add up the cost of electrocardiograms, scanographs, stress tests, physician's fees for all of that, and compare it to the cost of an adequate work assessment program, I would imagine that the latter is not as expensive.

The APA does not believe that every patient suffering from a psychiatric disorder and undergoing a CDI or initial SSDI review needs to go through an entire work assessment. There will be patients who obviously cannot work, based on the Listings -- though as I have mentioned, these are very few in number. However, those applicants who fail to meet the Listings and for whom an evaluation of their work history, course of illness, history of stress tolerance, etc. does not lead to a finding of disability, should have the benefit of a work assessment before they can be terminated. We believe that absent other findings which would remove someone from the SSDI/SSI rolls, (such as current employment, substantial medical improvement, etc.), terminations based on capacity to work should only occur upon a full work evaluation.

The House Ways and Means Committee noted in its report that:

> "The committee is also concerned that the evaluation of the person's ability to work be made in a context that accurately reflects the capacity to work in a normal, competitive environment. Such an evaluation does not necessarily require a full 'work evaluation' by a vocational expert in each case, although such evaluations are desirable and should be used wherever feasible where the additional information provided by such evaluations would be helpful in deciding close cases. The committee particularly urges that such evaluations should be used if at all possible in cases of mental impairment, where necessary to aid in determining eligibility in 'borderline' cases, at the point in the sequential evaluation process where such evaluations would normally be done under current policy.
>
> It is also important in such cases to evaluate the person's entire work history, rather than to examine only recent evidence of work activity, in order to determine whether the person can really engage in substantial gainful activity. The committee emphasizes

> that in any evaluation of work activity, the presence of work in a sheltered setting or workshop cannot in and of itself be used as conclusive evidence of ability to work at the substantial gainful activity level. Such work may be used in conjunction with other evidence that the beneficiary or claimant is not disabled, but benefits should not be denied simply because of sheltered work experience.

We urge this Committee to consider no less than the adoption of comparable report language.

PERSONNEL/CONSULTATIVE EXAMINATIONS

Yet another problem has been that the case records of SSDI beneficiaries have not been reviewed appropriately and accurately by state agency medical staff qualified to make an appropriate (if necessarily different from the claims examiner) judgment about a mentally ill patient. We know, for example, from a July 1982 letter from then Secretary Schweiker, following a meeting by the APA's Medical Director with the Secretary on the SSDI issue, that fully twenty-seven states did not at that time have sufficient numbers of psychiatrists on their medical staffs to perform appropriate reviews of mentally ill SSDI beneficiaries' records.

While the APA undertook and continues a targeted effort across its District Branches to seek means of relieving this tremendous short-fall of personnel with some success in locating interested psychiatrists, to our knowledge SSA has never informed DDS offices of our activities, and hence interested APA members have not yet been utilized in any significant way. This lack of meaningful SSA follow-up has not, of course, gone unnoticed by other interested psychiatrists who otherwise might have expressed further interest and participation.

In its report on the subject, GAO found that, in the five DDSs it visited, there were "no psychiatrists and limited psychiatric training was provided to examiners. Because the process encompasses a medical (psychiatric) evaluation that is highly complex, we asked SSA's psychiatrists whether a lay person or non-psychiatric physician had the expertise to make such an assessment. They said examiners would not be technically qualified nor would most physicians of other medical specialties. The chief medical consultant at one DDS said neither he nor the other staff doctors feel qualified to make a severity of psychiatric review form assessment."

Our proposal that each state agency hire psychiatrists or psychologists to assess mental impairment is critical. It is also entirely feasible. There are currently 28,000 APA members in the country, and perhaps as many as an additional 10,000 non-member psychiatrists. Each state should be able to fulfill our proposed requirement through full-time or part-time employment or consultative services of a psychiatrist or psychiatrists. States could even develop special relationships with teaching hospitals' and universities' departments of psychiatry, providing a mutually helpful relationship whereby psychiatric residents could provide their expertise in psychiatry, and at the same time learn about the disability program and its conduct.

We would also recommend that the Subcommittee review the existing fee rates established by the States against current competitive rates, with an eye toward establishing more appropriate minimum fee rates which will be more conducive to hiring and retaining full or part time physicians and consultants.

Similarly, we believe that more appropriate use of personnel performing consultative examinations needs to be made, and our legislative proposal addresses the quality and cost issues in this regard. Appropriately trained personnel to perform the CEs, and assurances that the CEs are of sufficient length and depth to "capture" the nature of the patient's problem are both critical, particularly for the mentally impaired. We note that SSA has been conducting an experiment in New York and Georgia designed to respond to our concern regarding the value of consultative examinations for the mentally ill. While we are not cognizant of any effort to assure that the duration of the examination is of a more appropriate length (certainly they should be longer than fifteen minutes), we do know that SSA has, in those two states, implemented the practice of two consultative examinations, spaced several weeks apart. SSA has indicated that this has been implemented in an effort to ascertain whether such multiple consultative examinations may better "capture" the actual condition of the mentally ill SSDI applicant or recipient under CDI. We understand that these consultative examinations are scheduled approximately two weeks apart. We applaud SSA's attempt in this regard, but, as in their prior activities, we have concerns about the efficacy of this new mechanism. First, we are not certain that a two week span is sufficient to "capture" the changes and fluctuations in the medical as well as functional aspects of the mentally ill. Second, we are not certain that the beneficiary is seeing the same examiner on both occasions -- something we believe should occur if the value of multiple consultative examinations is to be accrued.

Nonetheless, we are gratified by SSA's efforts to better manage the case development for the mentally ill SSDI beneficiary but believe that work in the way of personnel requirements is necessary.

THE PROCESS

Many of the severely mentally ill, the disabled capable of living in community-based settings as long as they receive proper therapeutic services, medication (if necessary), and social services to control their symptomology are unable to understand the meaning of a CDI review. They do not understand that their only source of income is being threatened, that their Medicare benefits (and/or Medicaid in the case of SSDI beneficiaries receiving SSI supplementation) -- the source of payment for their continued treatment -- is being threatened. They often do not understand the complexity of the forms they are asked to complete, or the necessity of such forms being completed in the first place. Further, given the nature of mental illness itself, it is often inappropriate, if not impossible, to receive an accurate self-evaluation from a mentally ill beneficiary. It is the very nature of the illness itself which causes a patient to deny or distort the medical significance of such illness. In a sense, much of what a mentally impaired individual may provide by way of narrative, either oral or written, is almost by definition going to be inaccurate, based on the nature of the illness itself.

Federal District Court Judge Jack Weinstein, in rendering his decision in New York on January 11, 1984, noted that "the mentally ill are particularly vulnerable to bureaucratic errors. Some do not even understand the communications they receive from SSA. Others are afraid of the system. Even with help from social workers, many do not appeal denials or terminations."

We believe that the proposals to streamline the multi-level process have particular merit for the mentally impaired. The elimination of at least one step -- reconsideration -- and the movement of face-to-face meeting to the earliest steps in the process (at a beneficiary's request) makes good sense. Through such a face-to-face meeting, the initial State DDS adjudicator would best be able to explain to the applicant the basis for a preliminary decision to terminate or deny initial application. Often, physically and mentally impaired persons are easily discouraged and lack the capacity for sustained conflict and confrontation. The shortening of the process, the "uncomplicating" of the process, will remove what can best be described for some as an insurmountable obstacle. As Secretary Heckler announced at her press conference last June, the objective is to end the insensitivity of the existing process, to "humanize" the routine -- we believe our proposal achieves that objective.

COST

The cost of the proposals contained in H.R. 3755 and S. 476 have been hotly disputed -- with SSA estimates running nearly double those of the Congressional Budget Office, and assumptions upon which such cost estimates are based varying widely. The savings originally envisioned by the GAO in 1980 have been far exceeded as the result of the adjudicative climate surrounding the accelerated review process. Yet at the same time, the cost of the accelerated review process, and its subsequent "fallout" in terms of appeals and suits, has been substantial -- perhaps costing more than the savings already achieved and nearly reaching the cost of the legislation at issue today.

Federal District Court Judge Weinstein's memorandum preceeding his recent order in City of New York, et. al. v. Margaret Heckler case pointed out that in New York alone, the City and State have suffered economic injury in having to meet the needs of those removed from the disability rolls. "Their shelter programs, welfare system and hospitals have been burdened. The project coordinator for an SSI outreach program in the City's shelter program for the homeless estimated that 40% of those housed in shelters had been denied or terminated from SSI and SSD benefits. At least one third of those housed in the system had a history of psychiatric hospitalization." He further noted that "a study by the New York State Department of Social Services estimated that if 80% of those terminated from Social Security in 1982 applied for public assistance, a $26.9 million increase in annual expeditures would be expected, of which the State and local governments would bear over $8 million." Further, testimony was heard in the case that it costs approximately

$1000 in staff time by the New York State Office of Mental Health Community Services to help a mentally ill client pursue an appeal of denial of benefits to the Administrative Law Judge level.

The Committee should bear in mind that these costs are in one state alone, and that almost $20 million of the increased expenditure in public assistance is from Federal, not state or local coffers.

Perhaps most interesting in the Court's decision was the point that "the Social Security Disability and SSI programs were enacted in part to relieve state and local welfare burdens. The purpose is apparent, in the first place, from the statute itself." What we see in New York, and elsewhere, is a shifting of the burden to the State and locality from whence it was lifted in 1956, not an outright cost savings.

There is another cost to the accelerated review process — that of the readjudication of allegedly improper decisions. There are now 18,000 SSDI cases pending in Federal District Court around the country. Those represent cases which had been adjudicated to that level (itself a costly process). The costs to the Federal government to hear these 18,000 cases are substantial in and of themselves. Added to those costs are the award of back benefits if the plaintiff succeeds in his or her case. In both Minnesota and New York, SSA has been ordered by the court to locate and review those individual mentally ill beneficiaries who were terminated from the rolls under an erroneous SSA interpretation of residual functional capacity. That second review of these beneficiaries also costs substantial Federal dollars.

While I am not an actuary or accountant, and cannot place a dollar value on many of these points, I do know that court proceedings are not inexpensive. I do know that it costs more to review cases twice than it would to review them correctly once. To argue that legislation such as H.R. 3755 or

S. 476 costs too much is to deny the actual cost savings which would accrue if the program were not subject to the kinds of Federal, state and local expenditures now being experienced to litigate issues which would be addressed and resolved were this legislation adopted.

CONCLUSION

The need for legislation like H.R. 3755 and S. 476 is clear. I have outlined the sound medical reasons the APA believes statutory change envisioned by these bills is necessary to protect the mentally ill impaired as well as to protect the intent of the SSDI program itself. I do not need to remind this Committee that over 30 states in the country have themselves decided that change is necessary -- change in the form of more reasoned standards based on more clear statutory authority, and change in the current adjudicative climate -- and have registered their concern by taking unilateral action with respect to the SSDI program by either imposing a moratorium or applying their own evaluation standards.

The hue and cry about the SSDI program has been ongoing for the past two years. The legislation has been developed, debated, revised and reviewed. Cost analyses have been developed and redeveloped, with different assumptions deriving differing costs. Throughout the time, the disabled have waited -- some fearing review, some undergoing review, some appealing the decision to terminate them, some living, some dying.

It is time to respond.

The APA is grateful to the Committee today for giving us the opportunity to share our concerns about the SSDI program as it has been affecting the mentally impaired. Your efforts and those of your staff to work with the APA and other concerned organizations both in the past and in this session, we hope, will allow substantial and meaningful reform to the SSDI and SSI programs.

Chairman PICKLE. That'll be fine. Now, the Chair will ask Mr. Frederick Spencer, Mr. Denver Thornton, and Ms. Marilyn Rauch to come forward. Mr. Spencer is an attorney from Mountain Home, AR. Denver Thornton is an attorney from El Dorado. And, then Marilyn Rauch, who is a staff attorney for the Central Arkansas Legal Services in Little Rock.

We'll ask each one of you to present your statement, and we'll start with you, Mr. Spencer, if you will.

Mr. SPENCER. Mr. Chairman, should I present my—you asked for a statement. I have an appendix here of approximately 300 pages long and have made it in book form. Do I make it a part of the record at this time?

Chairman PICKLE. Mr. Spencer, you've called and raised me. We'll include your statement and then we will make your record as a part of the hearing, and receive it, but I don't know that it would be made a part of the record. But it will be referred to as a part of the record and will be kept in our files.

Mr. SPENCER. Thank you, sir. The original is here and I would be happy to submit it to you.

Chairman PICKLE. That's fine.

STATEMENT OF FREDERICK S. SPENCER, ESQ., MOUNTAIN HOME, AR

Mr. SPENCER. Mr. Chairman Pickle, distinguished Senators and Representatives, ladies and gentlemen, thank you for your concern on this issue today so relevant to so many who I will attempt to represent today.

My name is Rick Spencer. I'm a solo practitioner and have been since 1975 in Mountain Home, Baxter County, AR, with a county population of approximately 10,000. I have worked over 9 years as a claimant's attorney in both administrative and tort law. My father, J.V. Spencer, Jr., and grandfather, J.V. Spencer, Sr., were both lawyers in El Dorado, in the firm of Spencer & Spencer. I have grown up being taught and believing that we are a Nation of laws—and not of men.

For the past year I have been president of a nonprofit plaintiffs lawyers' organization known as the Arkansas Injured Workers' Association, and State chairman of the National Organization of Social Security Claimants' Representatives.

Both organizations represent attorneys who are attempting to call attention to the horrow of their clients' plight at the hands of the Federal CDI Program as misinterpreted by the Social Security Administration administrators and regulators. We believe that Secretary's policy contravenes the spirit and purpose of the 1980 congressional mandate and the law.

The large appendix of 300 pages clearly and distinctly points out this mandate and the violations of the Social Security Administration. But today I speak as an individual, not as a representative of the Arkansas Injured Workers' Association or N.O.S.S.C.R. I speak today as the voice of the hundreds that I have actually seen crying in my office, as they lost their homes and property and suffered great hardship.

I have written and lectured on the subject of Social Security law and its relationship to a large volume practice. Yet my awareness on the subject continues to grow as I observe with amazement the inner-workings of this system originally espoused as the answer to our national health and disability insurance needs when the Social Security Act was in its infancy.

Frankly I'm shocked at the anarchy within the Social Security Administration and what the present regulators get away with in the erroneous name of savings of benefit dollars. I am also amazed at the skill of the Social Security Administration in blaming Congress' 1980 mandate or this subcommittee or any other scapegoat available at the time. The origination of this confusion and lack of trustworthiness begins and ends in the Social Security Administration.

In short, the Federal SSA regulators are not to be trusted. A blatant example of their lack of trustworthiness is the *Bono* settlement attached to this statement where the Social Security Administration promised to not use quotas and goals to target ALJ's and threaten their jobs. And, thereafter soon broke their oath and turned around and showed no loyalty to their signature and honor as shown by the numerous attached memos.

They sabotaged the agreement, thereby going a long way in destroying the independence of judges guaranteed by the Administrative Procedure Act, and the U.S. Constitution, to which you, Mr. Chairman, and gentlemen, believe in and have sworn to uphold.

I want to add that your trustworthiness and integrity and commonsense will, I believe, carry Americans out of this torture chamber. The real victims of this anarchy within the SSA that really bothers me, and I say this because I have been there and I have seen them—are the innocent children of disabled parents who have no understanding as to why their parents are loosing their homes.

The peace within their family to which they are entitled is suddenly destroyed by foreclosures, financial stress, and even I have observed suicides. These suicides in my experience are triggered, precipitated or caused by wrongful and insensitive terminations by the SSA.

Mr. Ken Patton, the previous State Social Security Director—when I contacted him—at the point of tears after a suicide in our area when a man was terminated from SSA—merely said, "There's nothing I can do about this strict regulation, Rick. My boss is Martha McSteen and I have no choice but to follow these regulations." He said that until he left under pressure, and he was rewarded for his blind loyalty to her regulations promulgated in violation of the original Social Security Act by a healthy raise in position within the SSA system. You see, the Social Security Administration apparently rewards blind loyalty.

But before I obscure my credibility with what may appear to be some blind emotion in itself, let me emphasize that I believe the CDI process as it was originally intended by Congress was a good enactment and basically would have served a fair purpose. There were cases of the 25-year old who was in the body cast who had had a car accident and was going to get better or the 35-year-old who had open-heart surgery with great success. They may have nonpermanent injuries and their medical condition, improvement and vocational ability should be reasonably monitored from time to time. Congress' intent was to have accountability for everyone who had nonpermanent impairments.

But at least 90 percent of disability recipients were thrown into this nightmare of CDI procedures in clear violation of the mandate, the recipient's constitutional rights to due process—as found by the numerous cases that I have attached to my written statement—and even contrary to their own regulations, which I have cited.

Included persons within the CDI process were many persons with chronic, degenerative, progressive, permanent, and total disabilities. So, the CDI process as misinterpreted by the SSA can be summed up by the following: too hasty, too broad and utterly renegade.

The adjectives of "renegade" and "anarchist" in the title of my written statement are not given lightly. A renegade is a traitor. The Social Security Administration's violation of a serious agreement after settling a lawsuit by their promise, and their violation of their limited rights given by Congress clearly establishes conduct representative of a traitor to the people of our United States.

An anarchist is one who spurns the law and thereby creates great disorder. Such is clearly established by what is falsely called a policy of nonacquiescence by the secretary. There is a great misunderstanding here. Every agency which has followed such a policy of nonacquiesence has still followed the law of the land as interpreted by that jurisdiction.

For instance, the Internal Revenue Service will apply its policy in line with the cases and decisions as the court interprets the enactments of Congress within that jurisdiction, yet not so with the SSA. Especially—especially when all courts—all courts of the United States find: (1) that there must be medical improvement to terminate benefits; (2) that there must be more weight given to the treating physician's reports than to a consultative "one-shot doctor"; (3) the secretary must consider the combined effect of all limitations; and (4) the subjective complaint of pain even without objective evidence may be grounds for disability.

The Social Security Administration's blatant disregard of the law which causes so much suffering is "anarchy." It is not nonacquiescence. "Acquiescence" is defined as consent without protest. "Nonacquiescence" is consent with protest. "Anarchy" is spurning the law and thereby causing great disorder in a society. Anarchy is the absence of the consent to the law. And, has it caused disorder?

One must only go to the district office in Arkansas and try to get in to see a claimant representative—which is a term which is a true antithesis in most cases. Most district offices have windowless walls, automatic-locked buzzer doors and one bank-teller window. The paranoia of claimants' representatives and the fears expressed by those involved in the face-to-face hearings is interesting.

Could it be that these administrators consciously or subconsciously realize what they are doing to these claimants? How can face-to-face interviews cause constructive change when neither party place trust in the other? Though I have had many claimants with severe mental illness, may I suggest that much is communicated by the Social Security Administration and through their employees' body language to these people.

Though chronically depressed, they are still human and have sense and dignity. I have never felt threatened by them. Why? Because we trust each other.

I am told that people in one part of Arkansas trust only one lady in the DO who truly is a claimants' representative. She was in charge of the district office for many years. She really cared for people but she was demoted for "taking too long with claimants with their problems." She was falsely accused of other minor violations and now is the only employee who has no key to the office. Why? Well, it was taken away you see, because she would get to the office early and leave late, and this conduct embarrassed fellow employees.

Others clearly were jealous of her popularity with the people, and expressly jeered at her sensitivity. She is now—right now—predictably tired and ready to quit after being told for the first time recently in her many years with the SSA that she "represents" the Social Security Administration—not the claimants.

How can we expect any success in face-to-face interviews or in the SSA with such a breakdown in trust within an environment of paranoia where real human concern is discounted and ridiculed within the district offices? Is it any surprise that true claimants' representatives are in the same category as the administrative law judges—that is, targeted and intimidated?

The serious problem now in the Social Security Administration itself is one of attitude and morale. Hurting people in violation of the law can only result in low self-esteem and terrific guilt. The truly interesting phenomenon is the failure of the Social Security Administration to fully appreciate the foreseeable consequences of their approach to the CDI process by the Social Security Administration.

The delays are incomprehensible and inexcusable. There was little preparation by the Social Security Administration for the results of their CDI process. My clients are told to expect to wait 3 months before the appeals council finishes their reversal of favorable decisions or even affirm their denials. The decisions appear to be canned in computer typewriters just as the dilatory process referred to as a "reconsideration."

I feel reconsideration is a useless appeal step and a joke with the only result of delay.

The establishments of moratorium in several States are the result of the U.S. executive branch of Government's reluctance to get involved in the present conflict between the judicial and administrative branches. There was a vacuum in leadership in the executive branch and the Governors were forced to act in order to prevent further future victimization of their citizens by the conflict between the SSA, which is part of the executive branch, and the judicial branch.

History tells us that even President Nixon finally gave up the tapes as ordered by the court, but not so with the Secretary of Health and Human Services. She does as she wants. The States are not in a state of rebellion. They merely are doing what President Reagan would not do, and if the Social Security had done a better job of managing their reviews without such widespread bigotry and imposed hardship, there would have been no State action necessary.

The States were frankly placed against the wall, Mr. Chairman, by the failure of leadership at the White House and the runaway "witch hunt mentality" in the Social Security Administration. If President Reagan confirms Martha McSteen, hopefully then he will no longer be as successful at avoiding the appearance of no knowledge of this disgrace.

Again, this disgrace is not to be tagged on the legislators, the subcommittee, or any action or inaction of Congress up to this point. Congress and this committee have shown sensitivity to the issues up to this point. Today we have open minds, open ears, and open communication. But do we have representatives from the Regional Social Security Administration?

It is my understanding that before this hearing they refused an invitation to participate. I can say I have an open mind. Some lawyers are like an attorney in a sister State who joyfully commented that President Reagan was greatly enhancing his income by the conflict between the SSA and the courts.

But there were many lawyers in this State—one sitting here beside me—who also could no longer allow further victimization of their client without protest. We believe we will make more money in the long run and sleep better by exposing this cancer and helping to cut it out. I decided to begin an organization such as the AIWA when a mother of four with two postlaminectomies and severe mental problems, actually on the brink of suicide, came into my office after being cut for the third time. The only winner of the policy of the SSA was myself. The taxpayer certainly was not winning. The Social Security Administration was not winning. The courts were not winning, and certainly this poor lady was not winning.

An additional interesting phenomenon in the past is the on-motion review procedure of the SSA. The Appeals Council historically, as you know Mr. Chairman, and by law and by regulation affirmed the ALJ unless there was no substantial evidence. They allow the ALJ to be the trier of facts, since only he personally observed the claimant's credibility. Not so in practice today.

Men who have no legal background—and that's not the big issue—and who have never seen the claimant—that is the big issue—second-guess the ALJ based allegedly on the cold typed record. But often I wonder if they ever even read the record.

Apparently the Appeals Council believes now that they are in the best position to try the facts and actually participate in de novo reviews of the ALJ. It is inconceivable in our system of justice:

One, that the judge who tries the facts and applies the law is targeted by a threat of firing for holding in favor of one party rather than another upon the law, rather than rulebook of that losing advocating party.

Two, that the losing party can then walk into the supposedly independent judge's office, tear up his decision, send him to school, harass him, and write another decision now in favor of themselves.

Three, require the party that won—who has now lost because of this action—to prove there was no substantial evidence for this party to hold against the claimant. If ever there were persons who believe in the competency of a governmental agency to completely rule themselves, the CDI process and the wake of human misery left behind must compel one to seek an independent judiciary which, along with the jury system, is the very cornerstone of our system of justice.

It's worked for many centuries——

Chairman PICKLE. Mr. Spencer, I must ask you to summarize in an additional minute, and then we can come back and we'll have different testimony. I would like to have all your testimony but we simply don't have the time. I don't want to cut you off but I would ask you try to summarize in 1 additional minute so that these other witnesses can be heard. And, then we'll come back if we have time.

Mr. SPENCER. Well, Mr. Chairman, the 300 pages, 295 of them are appendix, if that helps any. The other is my statement, but I would be happy to stop and sum up if that's what you would like for me to do.

You know there's been a past survey in the middle 1970's which show that 15 percent, before the CDI process, 15 percent of the persons cut from SSA disability roles were able to return to substantial gainful activity. And, a recent GAO report before the CDI process indicated that the disability fund was basically sound through the middle of the next century.

Therefore, Government actuary personnel had actually predicted many more disability recipients. That's what's indicated by that GAO report. So, it makes no sense for the Social Security Administration to compare the Social Security Administration disability programs with other Government welfare programs.

There was no runaway spending for the disabled. Yet, over 90 percent are notified without cause of a termination because of more stringent regulations have been passed. Americans entitled to disability have the right to be angry when their Government insurance only insures them hardship and grief.

Attached to this statement, as I've said earlier, is a number of statements, letters, admissions against interest of the Social Security Administration themselves and articles giving credence to my statements. Some may think I've been too harsh. I would ask them to sit behind my desk 1 week and talk to my clients.

Right now there are approximately 100 clients that I have counted in my files who are either in bankruptcy, have lost their homes, have moved in with children, or are on the brink of losing their homes if not their sanity. No matter what this group of honorable men recommend I will survive in my profession. But will they?

Your recommendations and actions will be the answer to their dilemma. May God go with you in your quest. Thank you for your attention in this matter.

[The prepared statement follows:]

STATEMENT OF FREDERICK S. SPENCER, MOUNTAIN HOME, AR

Mr. Chairman Pickle, distinguished Senators and Representatives, ladies and gentlemen, thank you for your concern on this issue so relevant to so many who I will attempt to represent today. My name is Rick Spencer. I am a solo practitioner and have been since 1975 in Mountain Home, Baxter County, Arkansas, with a county population of approximately 10,000. I have worked for over nine years as a claimant's attorney in both administrative and tort law. My father, J.V. Spencer, Jr. and grandfather, J.V. Spencer, Sr., were both lawyers in El Dorado, Arkansas in the firm Spencer & Spencer. I have grown up being taught and believing that we are a nation of laws—not of men.

For the past year, I have been President of a non-profit plaintiff's lawyers' organization known as the Arkansas Injured Workers' Association, Inc. and State Chairman of the National Organization of Social Security Claimants' Representatives. Both organizations are attempting to call attention to the horror of their clients' plight at the hands of the federal C.D.I. program as misinterpreted by the SSA administrators and regulators. We believe the Secretary's policy contravenes the spirit and purpose of the 1980 Congressional Mandate (See pp. A-4 to A-13 and pp. A-20 to A-28 of numerous articles wherein these organizations were involved), and the law.

But, I speak today as an individual, not as a representative of A.I.W.A. or of N.O.S.S.C.R. I speak today as the voice of the hundreds I have seen crying in my office as they lost their homes and property and suffered great hardship. I have written and lectured on the subject of Social Security law and its relationship to a large-volume practice (See pp. A-1 to A-3). Yet, my awareness on the subject continues to grow as I observe with amazement the inner-workings of this system originally espoused as the answer to our national health and disability insurance needs when the Social Security Act was in its infancy. Frankly, I am shocked at the anarchy within the SSA in the past and what the present regulators get away with in the erroneous name of savings of benefit dollars. I am also amazed at the skill of the SSA in blaming Congress' 1980 mandate of this Sub-Committee or any other scapegoat available at the time. The origination of this confusion and lack of trustworthiness begins and ends in the SSA.

In short, the federal SSA regulators are not to be trusted. A blatant example of their lack of trustworthiness is the Bono settlement attached to this statement where the SSA promised to not use quotas and goals to target Administrative Law Judges and threaten their jobs. Thereafter, the SSA soon broke this oath and turned around and showed no loyalty to their signatures and honor as shown by the numerous attached memos. They sabotaged the agreement, thereby going a long way in destroying the independence of judges guaranteed by the Administrative Procedure Act (See pp. A-14 to A-18; pp. A-36 to A-41; pp. A-53 to A-55; pp. A101 to A-103, and the United States Constitution (See pp. A-143 to A-192), to which you, Mr. Chairman and Gentlemen, believe in and have sworn to uphold. I want to add that your trustworthiness and integrity and common sense will, I believe, carry Americans out of this torture chamber.

The real victims of this anarchy within the SSA that really bothers me are those innocent children of disabled parents who have no understanding as to why they are losing their homes. The peace within their family to which they are entitled is suddently destroyed by foreclosures, financial stress, and even suicides. These suicides in my experience are triggered, precipitated or caused by wrongful and insensitive terminations by the SSA. Mr. Ken Patton, previous State Social Security Director, when I contacted him after a suicide in our area after this man was terminated merely said, "There's nothing I can do about these strict regulations, Rick. My boss is Martha McStein and I have no choice but to follow these regulations". He said that until he left under pressure, he was rewarded for his blind loyalty to her regulations promulgated in violation of the original Social Security Act by a health raise in position within the SSA system. You see, the SSA apparently rewards blind loyalty.

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The adjectives of "renegade" and "anarchist" in the title of my written statement are not given lightly. A "renegade" is a traitor. The Social Security Administration's violation of a serious agreement after settling a lawsuit by their promise and their violation of their limited rights given by Congress clearly establishes conduct representative of a traitor to the people of our United States.

An "Anarchist" is one who spurns the law and thereby creates great disorder. Such is clearly established by what is falsely called a policy of "non-acquiescence" by the Secretary. There is misunderstanding here. Every agency which has followed such a policy has still followed the law of the land as interpreted by that jurisdiction. The Internal Revenue Service will apply its policy in line with the cases and decisions as the Court interprets the Enactments of Congress. Yet, not so with the SSA (See A-123 to A-142) especially when all Courts of the United States find that (1) there must be medical improvement to terminate benefits; (2) there must be more weight given to the treating physician's reports than to a consultative "one-shot" physician; (3) the Secretary must consider the combined effect of all limitations; and (4) the subjective complaint of pain even without objective evidence may be grounds for disability. The Social Security Administration's blatant disregard of the law cause so much suffering is anarchy. It is not non-acquiescence. Acquiescence is defined as "consent without protest". Non-acquiescence is consent with protest. Anarchy is spurning the law and thereby causing disorder in a society. Anarchy is the absence of consent to the law. Has it caused disorder?

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The serious problem now in the SSA itself is one of attitude and morale. Hurting people in violation of the law can only result in low self-esteem and terrific guilt.

The truly interesting phenomenon is the failure of the SSA to fully appreciate the foreseeable consequences of their approach to the C.D.I. process. The delays are incomprehensible and inexcusable. There was little preparation by the SSA for their results of their C.D.I. process. My clients are told to expect to wait three months before the Appeals Council finishes their reversal of favorable decisions or even affirmance of denials. The decisions appear to be "canned" in computer typewriters just as the dilatory process referred to as a reconsideration. I feel reconsideration is a useless appeal step and a joke with the only result of delay. (See 20 C.F.R. § 404.918).

The establishments of moratoriums in several states are the result of the executive branch of government's reluctance to get involved in the present conflict between the Judicial and Administrative branches. There was a vacuum in leadership in the Executive Branch and the Governors were forced to act in order to prevent future victimization of their citizens by the conflict between the SSA (part of the Executive Branch) and the Judicial Branch. History tells us that even President Nixon finally gave up the tapes as ordered by the Court—not so the Secretary of Health and Human Services. The States are not in a state of rebellion. They merely are doing what President Reagan would not do, and if the SSA had done a better job of managing their reviews without such widespread bigotry and imposed hardship, there would have been no State action necessary. The States were frankly placed against the wall by a failure of leadership at the White House and a run-away witch hunt mentality in the SSA. If President Reagan confirms Martha McStein, hopefully, then he will no longer be as successful at avoiding the appearance of no knowledge of this disgrace.

Again, this disgrace is not to be tagged on the Legislators, this Subcommittee or any action or inaction of Congress up to this point. Congress and this Committee have shown sensitivity to the issues to this point. Today, we have open minds, open ears and open communication. But do we have represenatives from the Regional SSA? It is my understanding that before this hearing, the SSA refused an invitation to participate. I can say I have an open mind. Some lawyers are like an attorney in a sister state who joyfully commented that President Reagan was greatly enhancing his income by the conflict between the SSA and Courts. But there were many lawyers in this State who also could no longer follow further victimization of their clients without protest. We believe we will make more money in the long run and sleep better by exposing this cancer and helping to cut it out. I decided to begin an organization such as the A.I.W.A. when a mother of four with two post-laminectomies and severe mental problems came into my office being cut for the third time. The only "winner" of this policy was myself. The taxpayer certainly was not winning. The SSA was not winning. The Courts were not winning and certainly this poor lady was not winning.

An additional interesting phenomenon in the past is the on-motion review procedure of the SSA. The Appeals Council historically and by law and regulation affirmed the Administrative Law Judge unless there was no substantial evidence. They allowed the ALJ to be the trier of fact since only he personally observed the claimant's credibility. Not so in practice today. Men who have no legal background in Baltimore and who never have seen the claimants "second guess" the ALJ based allegedly on the cold typed record. Often I wonder if they even read the record. Apparently, the Appeals Council believes now that they are the best trier of fact and actually participates in de novo reviews of the ALJ. It is inconceivable in our system of justice:

(1) That the judge who tries the facts and applies the law is targeted with a threat of firing for holding in favor of a party rather than another upon the law rather than the "rule book" of that losing advocating party.

(2) That the losing party can then walk into the independent judge's office, tear up his decision, send him to school, harass him and write another decision now in favor of the losing party; and

(3) Then require the party that won to prove that there was no substantial evidence for this party to hold against the claimant. If ever there were persons who believed in the competency of a governmental agency to completely rule itself, the C.D.I. process and the wake of human misery left behind must compel one to seek an independent judiciary which (along with a jury) is the very cornerstone of our system of justice.

It's worked for many centuries—who wins by changing it now except the few who rule with an iron hand. Such "justice" smacks of the iron curtain mentality and seeks to substitute "computer logic". But "garbage-in" means "garbage-out". Should a machine decide our citizens' fate? And who defines "disability" unilaterally and undemensionally. When all realize that each person has a different threshold of pain, a different ability to cope and a different set of past experiences to define his or her limitations, we will find peace within this system again. People are polydimensional. As a famous man once said, "Each individual person is a fingerprint of God". Can we apply the perfect science of mathematical regulations to human beings and their abilities to engage in substantial gainful activity? The SSA has even violated its own regulation making authority with their regulations. (See 42 U.S.C.S. § 405(a); 5 U.S.C.S. § 553(b); and 5 U.S.C.S. § 553(c). Without courts, where would we be?

Perhaps the most telling sign of the confusion and anarchy within the SSA is the recent POMS giving automatic disability benefits to homosexuals with AIDS because of the likelihood of death whereas one must have acute leukemia for two and one-half years to be automatically entitled to disability. (See Listing 7.11 of 20 CFR, Pt. 404, Subpart P of Appendix 1). I can think of nothing more likely to cause death than acute leukemia. But homosexuals with a little understood and less studied disease of AIDS are given the benefit of the doubt. That's good. But what about the heterosexual father or mother of small children or widow who can't wait to die or afford to live two and one-half years. This is the stupidity that results when we allow government to be run by men rather than laws. Justice must be color blind, justice must be gender blind and justice must be equally applicable to all Americans without any restraint.

A growing cancer among administrative agencies is this desire to computerize justice. Such an approach is a "Cop-out". The Judge does not have to think if there is only blind loyalty to listings or "certain facts". This is similar to the old Feudal rigid constrictions of the King's Law. Even he gave the cases involving human issues to Chancellors—men of the church with morality and good judgment.

It is interesting that this country has defined "negligence" as "what a reasonable man will do or not under the same or similar circumstances". Never have we computerized or attempted to define in detail this standard in our system of justice. Yet our system has lasted over 400 years. Such a definition could be criticized as vague. Yet it works. Why change the issues and confuse everyone?

In that light, "disability" has been defined as the inability of the individual to engage in substantial gainful activity. Is it vague? Maybe. But will it work? Yes, and it has worked for years. Why attempt to unilaterally define when all persons are "disabled" or "not disabled" based upon sterile regulations contrary to the spirit and humanitarian purposes of the Act. Even the SSA is confused (See A-42 to A-44 and pp. A-283 to A-284.) Note: This is the guide to evaluation of permanent impairment.

My city library door when I was young was crowned with these words: "Knowledge is power". In order to get away with such blatant disregard of the law, the SSA has enacted policies which discourage competent and knowledgeable attorneys from representing claimants. (Se pp. A-96 to A-100). There is no question that unless Congress acts to alleviate the conflicts (See pp. A-123 to A-142 evidencing 70 areas of non-acquiescence) between the SSA and the Judicial Branch, the Court will be forced to throw the Secretary of Health and Human Services in jail and fine her. They have threatened to do this in Hillhouse (See pp. A-45 to A-48; pp. A-143 to A-192). Surely such an embarrassing situation should be remedied by the Congress.

The American citizens have paid into this system. This is not welfare. All hoped they would not be disabled, but if they were, they counted on the promise of disability income and medical benefits. Our citizens have that right. The SSA has the duty to provide benefits without harassment and game-playing to run down claimants.

A past survey in the middle 1970's showed that only 15% of those persons cut from SSA disability rolls ever returned to substantial gainful activity. A recent G.A.O. report before the C.D.I. process indicated that the disability fund was basically sound through the middle of the next century. Government actuarial personnel had predicted many more disability recipients. It makes no sense for the SSA to compare the SSA disability programs with other government welfare programs. There was no "run-away spending for the disabled". Yet over 90% are notified without cause of a termination because of more stringent regulations. Americans entitled to disability have the right to be angry when their government insurance only insures them hardship and grief.

Attached to this statement are a number of statements, letters, admissions against interest of the SSA and articles giving credence to my statements. Some may think I have been too harsh. I would ask them to sit behind my desk one week and talk to my clients. Right now, there are approximately one hundred clients who are either in bankruptcy, lost their homes, moved in with children or are on the brink of losing their homes if not their sanity. No matter what this group of honorable men recommend, I will survive in my profession. But, will they? Your recommendations and action will be the answer to their dilemma. May God go with you in your quest. Thank you for your attention to this matter.

[The appendix has been retained in the subcommittee files.]

Chairman PICKLE. Well, we thank you. You've certainly given us a very strong statement.

Now, Mr. Thornton, if you will proceed, sir.

STATEMENT OF DENVER L. THORNTON, ESQ., EL DORADO, AR

Mr. THORNTON. Mr. Chairman, Members of Congress, ladies and gentlemen, my name is Denver Thornton. I am a country lawyer from El Dorado, AR. I also serve as vice president of the Arkansas Injured Workers Association. This nonprofit organization was established in June of 1983 to lobby for Social Security and workers comp reform in Arkansas.

I have no quarrel with the systematic review of disability eligibility. However, the review has been inhuman and illegal. Arkansas has the bloodiest record in the Nation. Thanks to Governor Clinton we now have a new State director who has promised reasonable guidelines and has promised to follow Federal court decisions.

Can you believe that HEW took the position that it was not bound by stare decisis, that is court precedent, to follow lower court precedent, in effect snubbing its nose at the Federal district and Federal court of appeals.

The Arkansas case of *Hillhouse* v. *Harris* settled that issue. The *Hillhouse* opinion commented from *Hutto* v. *Davis,* a Supreme Court case of 1982, stating that "Unless we wish anarchy to prevail within the Federal judicial system a precedent of this Court must be followed by the lower courts no matter how misguided the judges of the lower courts may think it to be."

What is the source of such arrogance? Whatever the source, why should some ALJ's dishonor the oath they took as lawyers and judges to uphold the Constitution of the United States and to protect justice and guarantee due process? Some ALJ's buckled and burned because they aren't made of the right stuff and should have never been hired.

I should hastily point out that I am not critical of all ALJ's. I would particularly like to compliment the four administrative law judges based in Shreveport, LA, who serve the parishes in northern Louisiana. The three ALJ's from Fort Smith, AR, who dared to buck the system should be nominated for sainthood.

However, you and I both know that all is not well or we would not be here. The judicial aspect of the Social Security System is sick. The toxic contamination is being spread upon the disabled and is additionally sandbagging the Federal courts.

I would urge the Congress to abolish the appeals council. It does not serve any meaningful judicial function. I find that it is merely a rubberstamp of denial which slows the appeals process.

I would like to see the administrative law judges removed from all influence of politics. Senate bill 1911, which is Senator Pryor's bill, is a start. A free and independent judiciary is an absolute necessity.

In the future all ALJ's applicants should have strong litigation backgrounds and experience. Personal knowledge can't go beyond personal experience. Trial lawyers have historically been buffers against abusers of power, whatever the source. The ALJ's should be competent and courageous individuals hungry for justice.

You must remember that Social Security disability benefits are the difference between a minimal existence and standard of living and no standard. The needy and disabled must have a system of review and justice equal to other persons in our society.

Overall the body of Social Security law is reasonably sound and easy to understand. Getting the facts correctly applied to the law has been a difficult process.

Out of frustration our own Judge Richard Arnold in speaking for the eighth circuit in *McCoy, Desedare and Stack* v. *HEW,* set forth an 11-page printed opinion giving a blueprint that the ALJ should follow. The opinion is extremely well written and gives examples and approaches, nevertheless unbelievable opinions continue to flow from some of the ALJ's.

I have seen a Social Security judiciary become a bureaucracy. The mental anguish and fear that I have observed during the last 3 years as a result of this system is absolutely sickening. Great numbers of the ALJ's are more interested in their jobs than they are justice.

If you find that as a result of all of your studies HEW has attempted to influence the opinions of the ALJ's, I urge you to take strong action. Basic constitutional rights are being abused. We must have judges whom no king can intimidate.

[The prepared statement follows:]

STATEMENT OF DENVER L. THORNTON, EL DORADO, AR

Ladies and gentlemen, my name is Denver L. Thornton. I am a country lawyer from El Dorado, Arkansas. I also serve as vice president of the Arkansas injured workers association. This non-profit organization was established in June of 1983 to lobby for social security and workers compensation reform in Arkansas.

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Can you believe that HEW took the position that it was not bound by stare decisis to follow lower court precedent, in effect snubbing its nose at the Federal District and Federal Court of Appeals. *Hillhouse* v. *Harris,* 547 F. Supp. 88 (1982). The *Hillhouse* opinion at p 93 commented from *Hutto* v. *Davis,* 102 St. Court 703 (1982), stating "unless we wish anarchy to prevail within the Federal judicial system, a precedent of this court must be followed by the lower Federal court no matter how misguided the judges of those courts may think it to be."

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Out of frustration, our eighth circuit court of appeals, through Judge Richard Arnold, filed an eleven page printed opinion in the case of *McCoy-Desedare & Stack* v. *HEW,* 683 F. 2d 1138 (June, 1982), in an effort to set forth a blueprint that the ALJ's should follow in evaluating these cases. The opinion is extremely well written and even gives examples of the approach and guidelines to be followed. Nevertheless, unbelievable opinions continue to flow from some of the ALJ's.

I have seen social security judiciary become a bureaucracy. The mental anguish and fear that I have observed during the last three years as a result of this system is absolutely sickening. Great numbers of the ALJ's are more interested in their jobs than they are justice.

If you find that as a result of all of your studies HEW as attempted to influence the opinions of the ALJ's, I urge you to take strong action. Basic constitutional rights are being abused. We must have judges whom no king can intimidate.

Chairman PICKLE. Thank you, Mr. Thornton. Now, Marilyn Rauch, if you will proceed, please.

STATEMENT OF MARILYN RAUCH, STAFF ATTORNEY, CENTRAL ARKANSAS LEGAL SERVICES, LITTLE ROCK, AR

Ms. RAUCH. Thank you Congressman Pickle, Congressman Anthony, and Senator Pryor. My name is Marilyn Rauch and I am an attorney with Central Arkansas Legal Services in Little Rock. And, I thank you for the invitation to testify before you today.

I have been an attorney now with Legal Services for 4 years and, speaking for the Legal Services Program in Arkansas in general, we have seen a significant increase in our Social Security and SSI caseloads since early 1981. In comparing certain quarters of the past 3 years some programs show that case numbers double or even triple.

One does not have to represent very many claimants before becoming aware of the flood of people who are having to appeal their cases through the administrative process and the courts in order to obtain benefits or preserve them. Because of the judicial backlog and Social Security's routine requests for more time to answer complaints, many claimants have to wait as long as 2 years to get a court decision.

Part of the increase in numbers is due, of course, to the fact that more people are applying for disability benefits. But much of the increase is due to the fact that wrong decisions are being made earlier in the process. I understand that the Federal Court reversal/remand rate in the eastern district of Arkansas is quite high, about 60 percent. That means that 60 percent of the cases are being decided improperly below.

It is my opinion that given the history and extent of the problem nothing short of legislation from Congress is going to correct all the problems and help bring an end to the misery and suffering which this system has inflicted on thousands of citizens in Arkansas. I therefore, commend you and other Members of Congress who have led the way in investigating the system. I ask that you continue your vigilance and resist any stopgap solutions which the agency might propose as alternatives, and which we heard today they did propose, perhaps as alternatives to legislation.

I am only superficially familiar with legislation now pending in Congress and with a few small exceptions I am pleased with the content of the House bill. I think it will go a long way toward solving problems. There are too many specific issues of concern to me to address them all in this brief time, so I'm going to mention only a few of the most important ones which are of continuing concern to us here in Arkansas.

First of all, I believe that the Secretary should be required to show that a recipient's condition has medically improved to the point where he or she can perform substantial gainful activity before benefits can be ceased. This is of fundamental importance to these claimants and this standard has been judicially mandated in several circuits.

Without this standard there is danger that the person's benefits can be ceased simply because the case is being reviewed by different agency personnel. It is inequitable to say the least, for the continuation of benefits to hinge upon the exigencies of the day or the personalities of the adjudicators.

This is not a radical idea. It's my understanding that Social Security used a medical improvement standard until about 1976. And, we need legislation to make the standard the law with some narrowly drawn exceptions.

My second area of concern is in the evaluation of pain. The eighth circuit has led the way in establishing clear precedent which states that pain can be disabling and that because it is a subjective symptom not capable of measurement, there need not be objective medical evidence to support a conclusion that the person is thereby disabled.

What is needed is sensitive inquiry into the extent of the person's pain and how it affects his or her ability to function. The Social Security Administration, in assembly line style, continues to adjudicate cases by a search for objective medical evidence in spite of repeated admonitions from courts.

The agency refuses to take pain into adequate consideration unless the person can show tangible proof such as x rays, swollen joints, tenderness or heat. The eighth circuit is losing patience with Social Security on this issue in particular. The Court has lectured the agency and Judge McMillian has suggested that the Secretary might be held in contempt. Clearly then we need legislation to force the agency to abandon its recalcitrant behavior.

The agency's purposeful pursuit of an informal nonacquiescence policy on the issue of pain illustrates also the need for legislation requiring it to acquiesce in court rulings. The long line of eighth circuit pain cases reflects the court's frustration. Yet the agency continues to adhere to its old practices.

We Arkansas lawyers sometime may feel a little secure or smug on the issue of pain, but our clients are suffering. I have found myself telling other lawyers that we don't have to worry about pain in the eighth circuit because the law is so clear. But my clients are suffering by having to wait to the district court or the eighth circuit to win a pain case.

It is absolutely essential that the Social Security Administration like all parties in our legal system, be required to follow the orders of the circuit courts unless those orders are overturned. In the words of Judge Heaney in a recent law review article I quote—"The regulations of the Secretary are not the law of the land. It is the duty of the courts to say what the law is. Regardless of the Secretary's view of our decisions, these decisions constitute the law and should be respected by the SSA."

This doctrine is grounded in the Constitution and needs to be reinforced by congressional action. I support the nonacquiescence language contained in the House bill, although I would prefer or am somewhat concerned and I would like to have deleted language which seems to apply the law only to cases which are still appealable at the date of enactment.

Because there are already so many important court decisions on the books and because I don't believe Congress intends to limits courts' ability to enforce their own orders, the bill should require acquiescence in all circuit court decisions until the decision is overturned or formally stayed.

Additionally, there is language in the bill which would seem to allow nonacquiescence in a decision once the Secretary has filed an appeal. It seems to me more appropriate to require the agency, in accordance with the Federal Rules of Civil Procedure, to seek an order staying any judgment which it does not wish to acquiesce in during the appeal.

Those are my comments today. Thank you very much.

[The prepared statement follows:]

STATEMENT OF MARILYN RAUCH, STAFF ATTORNEY, CENTRAL ARKANSAS LEGAL SERVICES

Senator Pryor, Congressman Anthony, and Congressman Pickle, my name is Marilyn Rauch and I am an attorney with Central Arkansas Legal Services in Little Rock. Thank you for the invitation to testify before you today.

I have been an attorney with legal services for over four years. Speaking for the Legal Services programs in Arkansas in general, we have seen a significant increase in our Social Security and S.S.I. caseloads since early 1981. In comparing certain quarters of the past 3 years, some programs show their case numbers double or even triple.

One does not have to represent very many claimants before becoming aware of the flood of people who are having to appeal their cases through the administrative process and the courts in order to obtain or preserve benefits. Because of the judicial backlog and Social Security's routine requests for more time to answer complaints, many claimants wait as long as two years for a court decision. Part of the increase in numbers is due, of course, to the fact that more people are applying for disability benefits. But much of the increase is due to the fact that wrong decisions are being made earlier in the process. I understand that the federal court reversal/remand rate in the Eastern District of Arkansas is quite high, approximately 60 percent. That means that 60 percent of the cases were decided improperly below. It is my opinion that, given the history and extent of the problem, nothing short of legislation from Congress is going to correct all the problems and help bring an end to the misery and suffering which this system has inflicted on thousands of disabled citizens of Arkansas. I therefore commend you and other members of Congress who have led the way in investigating the system. I ask that you continue your vigilance and resist any stopgag solutions which the agency might propose as alternatives to legislation.

I am superficially familiar with legislation which is now pending in both houses of Congress. With a few exceptions, I am pleased with the content of the House bill; I think that it will go far toward solving some problems. I am not as familiar with the Senate bill, but the information I have causes me some doubts. I will be expressing some of my concerns with both bills in these remarks.

There are too many specific issues of concern for me to address them all in this brief time. I will therefore mention only a few of the most important ones which are of continuing concern to us in Arkansas.

First of all, I believe that the Secretary should be required to show that a recipient's condition has medically improved to the point where he or she can perform substantial gainful activity before benefits can be ceased. This is of fundamental importance to any recipient, and the standard has been judicially mandated in several circuits. Without such a standard there is danger that a person's benefits could be ceased simply because the case is being reviewed by different agency personnel. It is inequitable, to say the least, for the continuation of benefits to hinge upon the exigencies of the day or the personalities of the adjudicators. This is not a radical idea; Social Security used a medical improvement standard until 1976. Legislation is needed to make the standard the law, with some narrowly-drawn exceptions.

My second area of concern is with the evaluation of pain. The Eighth Circuit has led the way in establishing clear precedent which states that pain can be disabling and that because it is a subjective symptom, not capable of measurement, there need not be "objective medical evidence" to support a conclusion that the person is thereby disabled.[1] What is needed is a sensitive inquiry into the extent of a person's pain and how it affects his or her ability to function. Yet Social Security, in assembly-line style, continues to adjudicate cases by a search of objective medical evidence in spite of repeated admonitions from courts. The agency refuses to take pain into adequate consideration unless the person can show tangible proof such as x-rays of deformities, swollen joints, tenderness, or heat.

The Eighth Circuit is losing patience. The court has lectured the agency[2] and Judge McMillian has suggested that the Secretary might be held in contempt of court.[3] Clearly then, legislation is needed to force the agency to abandon its recalcitrant behavior.

The agency's purposeful pursuit of an informal non-acquiescence policy on pain illustrates also the needs for legislation requiring it to acquiesce in court rulings. The long line of 8th Circuit pain cases reflects the court's frustration. Yet the agency continues to adhere to its old practices. Arkansas lawyers may feel secure and a little smug on the issue of pain in Social Security cases, but our clients suffer. I have found myself telling people that we don't have to worry about pain in the 8th Circuit because the law is so clear. But our clients suffer by having to wait on a District Court or 8th Circuit decision to win a pain case. It is absolutely essential that the Social Security Administration, like all parties in our legal system, be required to follow the orders of circuit courts unless those orders are overturned by the Supreme Court. In the words of Judge Heaney, "The regulations of the Secretary are not the law of the land—it is the duty of the courts to say what the law is * * *. Regardless of the Secretary's views of our decision, these decisions constitute the law and should be respected by the S.S.A."[4] This doctrine, grounded in the Constitution, needs to be reinforced by Congressional action. I support most of the non-acquiescence language contained in the House bill, although I would perfer to have deleted the language which applies the law only to cases which are still appealable at the date of enactment. Because there are already so many important court decisions on the books, and because I don't believe Congress intends to limit courts' ability to enforce their own orders, the bill should require acquiescence in all circuit court decisions until the decision is overturned or formally stayed. Additionally, there is language in the bill which would seem to allow non-acquiescence in a decision once the Secretary has filed an appeal. It seems to me more appropriate to require the agency, in accordance with the Federal Rules of Civil Procedure, to seek an order staying any judgment in which it does not wish to acquiesce during an appeal. I am obviously also in total disagreement with some of the language proposed for the Senate bill which would allow non-acquiescence if the Secretary merely notified Congress of her intent and published in the Federal Register.

Chairman **Pickle**. Thank you, Ms. Rauch. Let me comment to you first since you've just finished your testimony. One provision of this legislation with respect to nonacquiescence says that when a decision is reached in a circuit court that that decision is applicable to all cases in that circuit court unless it is appealed to the Supreme Court for final adjudication.

This was opposed by the administration but at least we're trying to remove from the administration the authority or the right for them to just say, here's a single case and we'll isolate it and then will not apply to the thousands of other cases throughout the country. We think it's a step in the right direction and I hope that you have—you are in general agreement with that approach.

Ms. **Rauch**. Yes, sir, I certainly am. I think it's definitely a step in the right direction.

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[1] *O'Leary* v. *Schweiker*, 710 F.2d 1334 (8th Cir. 1983); *Brand* v. *Secretary of H.E.W.*, 623 F.2d 523 (8th Cir. 1980); *Northcutt* v. *Califano*, 581 F.2d 164 (8th Cir. 1978); *Tucker* v. *Schweiker*, 689 F.2d 777 (8th Cir. 1982).

[2] *Nelson* v. *Heckler*, 712 F.2d 346, 348 (8th Cir. 1983).

[3] *Hillhouse* v. *Harris*, 715 F.2d 428, 430 (8th Cir. 1983).

[4] Heaney, "Why the High Rate of Reversals in Social Security Disability Cases?"; 7 Hamline L. Rev. 1, 9-10 (1984).

Chairman PICKLE. You said that you weren't familiar with the legislation. I hope we'll have the staff give you a copy of the Anthony bill.

Ms. RAUCH. All right. I'll appreciate it.

Chairman PICKLE. So that you might have it here. Now, Mr. Anthony, do you have any questions of the panel?

Mr. ANTHONY. Mr. Chairman, thank you. First I would like to thank especially my two colleagues from my hometown for making very, very forceful statements. The statements were accepted from this Member's viewpoint as coming from the heart. They have watched the travesty and are willing to speak out. Sometimes you have to speak out in very harsh terms to get the administration's attention. Sometimes you also have to speak out in very harsh terms to get the public's understanding of what's going on.

I know you agree with me that we're not trying to protect able-bodied persons who are drawing disability. We're talking about real lives that have been affected. Rick, you have given us a document that we'll probably ask the staff to read for us and summarize so we can use some of the cases when we go to the floor for our debate on Tuesday.

I would like to ask both of you or all three of you, what is a sensitive question, and that's on lawyer's fees. Our legislation assuming that it is passed and implemented into law, provides for continuous payment of benefits. And, as I understand it right now you would draw your attorney fees out of a retroactive lump-sum payment. Could you give us some suggestions as to how we could handle this particular issue?

Mr. THORNTON. I strongly suspicion the next attack by HEW is going to be on attorney fees. The Social Security practice is not that lucrative, but if you dry up the representative they're absolutely at the mercy, of HEW and HEW does what they want to do.

It—the fees should be supervised with that ALJ. The fee should be reasonable and not limited to 25 percent because sometime maybe you get lucky and get a case heard and they're still drawing benefits, see. And there's nothing back there to draw from, yet you do as much work to prepare that case as if there would be 3 or 4 years of back benefits.

So, the fee ought to be a reasonable fee approved by the ALJ. I think the average fee in the country now is something like $1,200, I'm told. But I haven't seen those numbers, but I find that to be reasonably true in my office.

I want to comment on one thing that I think is drastically important. Recently in Fayettville this month one ALJ came over from Oklahoma and set 101 cases in 3 days. One man hearing 101 cases. And, he was getting away with it until—they got away with it in Texas, you see—they're not aggressive as we are, and one of the young trial lawyers filed an injunction over in Federal court and a Republican judge said, go ahead and do it that way if you like but you come up here to my court on a writ and I'm not only going to enjoin them but I'm going to put the person on Social Security and tell all the other lawyers.

Immediately Washington shipped in three more judges. Now judges can hear that many cases if they work hard in a 3-day period, but they've already done that over in east Texas, Congressman. And, they've done it in other areas and gotten by with it.

But this one judge they sent has a reversal record I understand, a denial record of something like 80 percent. Sandbagging the Federal court, when the El Dorado division, which is 6 counties in south Arkansas there were 173 cases filed last year in Judge Harris' court, 65 of them were Social Security cases, zero have been decided. They're still working on 1982 cases.

So we're 15 months in the lag. Now, that's not the judge's fault. You can't get those transcripts ready. It takes 6 months to get a transcript in sometimes. In 1982, Judge Harris' court reversed or remanded 60 percent of the cases he heard. That's—and reversing one is very tough. Substantial evidence is a hard burden to crawl over, but nevertheless 60 percent of them went back. I think the country would probably be——

Mr. ANTHONY. Rick, could you give us——

Chairman PICKLE. Mr. Thornton, let me interrupt you for just a moment. We made some reference to Congressman Anthony's hometown, El Dorado, and you have made reference to Judge Harris and cases he's had.

I want to make this observation to you and to all the people. When I first was elected to Congress I was assigned to the Interstate and Foreign Commerce Committee as it was called then. The chairman of that committee was Oren Harris. I want to say publicly he's the best chairman I ever served with in the United States Congress, an outstanding lawyer, a man of great heart and capacity. So I hope if any of you here have occasion to see Judge Harris you give him my regards.

Mr. THORNTON. I shall, sir.

Chairman PICKLE. He's still held in high respect in Washington.

Mr. THORNTON. He's had a drastic impact not only in Senator Pryor's life but Congressman Anthony and mine and even Rick's. As a politician and a judge we've been around him all our lives. He's 80 years old and holds court every day, has a ruptured disc, gets up there with a brace and goes on. He's frustrated—I think I could say that for him, because all these cases are coming to his court, and of course, the Federal courts have a great burden, you know, in other cases just staying up, the population is growing so much, litigation, et cetera.

Chairman PICKLE. In that connection do any of you want to make a comment? It's been recommended we might have a Social Security Court. This is separate and apart from the regular process for now going through appeal.

Mr. THORNTON. Absolutely.

Chairman PICKLE. Do you think there's merit to that proposal?

Mr. THORNTON. Absolutely. There's such a great number of cases, any judge, whether a municipal judge or anything else, ought to be free and independent. Must be if the system is going to work. That's one of my strong points.

Chairman PICKLE. Thank you. Senator Pryor?

Mr. THORNTON. And, to get money to do that—abolish the Appeals Council because they don't serve a judicial function to my knowledge.

Ms. RAUCH. Could I also throw in—I agree with what Denver said as long as we're sure there's access, good easy access to this court and that the Social Security and all parties are held to the Federal rules of civil procedure.

Chairman PICKLE. Thank you. Senator Pryor, do you have any questions?

Senator PRYOR. Yes, a comment and then a question. I received some letters and comments from attorneys around the State, Chairman Pickle, relative to the length of time it takes to finally reach the ALJ level of appeal and receive a determination at that level on a particular case.

Considering the hardship it causes on the claimant and his family during this lengthy process I think that many Members of the Congress have become very concerned. But there are delays even beyond that level.

I recently, for example, received a letter from an Arkansas attorney who had requested an appeals council review for his claimant and waited a full 2 years, 2 years—to receive a form letter from the appeals council stating that they would not review the case.

This is further justification for not only some program reform but also broader reform in the establishment of a Social Security judicial or court system that must deal with this issue. I assume that some of you have had similar experiences with this long appeal process. Would you just say yes or no, have you had experiences?

Mr. THORNTON. Absolutely. Seven years in one case.

Senator PRYOR. Seven years in one case.

Ms. RAUCH. Yes.

Mr. THORNTON. Finally Richard Arnold, who came off the Eighth Circuit was sitting back in Arkansas, just picked the case up and wrote the guy in and said, this has gone on long enough. I mean an obvious case of disability.

Senator PRYOR. And, what was happening to that claimant all that time, Denver? What was happening to that person trying to find out whether or not they were going to be on disability or not?

Mr. THORNTON. Mental anguish beyond belief probably. He was calling my office every other day and I would tell him to call your office, and——

Senator PRYOR. Causing you a lot of mental anguish, too, I guess.

Mr. THORNTON. And, you too, I'm sure. And, the Congressman's office. You just can't believe—of course, Rick and all three of us we sit at that desk out in the country and we see those tears, fears and anger, you know, it's just wiping people out beyond belief.

Mr. SPENCER. Let me answer your question, if I may, Mr. Chairman. He asked a question about attorney fees. I have found in my area that my clients, when they continue benefits to the client, consistently honor the agreement that we have. What we have is just an agreement between each other that when they get their check they come in and they put 25 percent of their check in a separate supervised trust account, which is held there and is not touched by my office until such time as I—my fee is approved.

Now, the thing I would think that would be an improvement, and it's not that I don't trust the people to bring in the money. I have pending 250 Social Security cases in my office at any given time. I have never to this day been cheated by any of my clients. If they know they owe it they're going to come in and pay it. But, let me just suggest this to you. There are people, other lawyers, and I have to speak on their behalf too, that say that a lot of clients don't understand. They spend the money and then they feel bad about it.

Would it not be easier if the Social Security Administration would just deduct and withhold the 25 percent themselves? They can hold it in their supervised account if they want to. And, then whatever fee is approved so long as it's reasonable and necessary for the professional services rendered, they send the check to the attorney. It's not because it's going to benefit me any more. It's for the benefit of the clients. They don't like to have to come into my office once a month and make a payment or send it in the mail. It just seems like it would be an easier process.

In response to what you said, Senator Pryor, the thing about delays that I have seen—and I have actually seen suicides—and I tell you last summer it happened and I decided that I was either going to get something done or I was going to get out of it. I couldn't take it. It's true.

Senator PRYOR. I understand that we had one individual who actually died in the administrative law judge's chambers or in the waiting room, I think in the past year, 1983.

Chairman PICKLE. Well, there have been many instances of horror stories and we all must acknowledge that. And, that's why we need to make corrections, and for the administration to say that we've been able to handle this administratively is just not the case. When you have 20 States who operate in this national program under court orders, and when you have 9 other States which by their own executive order have taken themselves out of the program, you see a national disability program that's in chaos.

We must have some correction.

Well, I want to thank this panel for your testimony and appreciate it very much. And, Mr. Spencer, we're going to make as much of that as part of the record as we can. You can leave that.

Senator PRYOR. I'm going to have some written questions too for the panel, because I think what they give us in input will help us shape some legislation.

Chairman PICKLE. Yes; it will be.

Senator PRYOR. Thank you.

Chairman PICKLE. And, the record will be kept open for that.

Now, we're going to ask the panel——

Mr. ANTHONY. Mr. Chairman, I'd be remiss if I didn't publicly thank both of these lawyers, because they've assisted my office and my staff in trying to find some reasonable suggestions for us to work into the legislative process. And, over and above being advocates for their claimants' position, I think they're truly trying to operate in the national interest to establish a good policy.

I think the record ought to reflect that.

Chairman PICKLE. Well, I'm glad you made that acknowledgment, Mr. Anthony.

Now the Chair is going to ask the next panel, and this is our last panel, if you'll come forward. The Honorable Jerry Thomasson, the

Honorable Francis Mayhue, the Honorable David T. Hubbard, and Minnie E. Dormois. If you will, please come forward.

Also as they are coming forward and taking their seat I want to acknowledge the presence of another individual here. A few minutes ago I saw Frank Whitback. Is he still here? Frank Whitback, a very prominent insurance executive here in this State invited me to Arkansas and here at Hot Springs about 2 years ago, wasn't it, Frank, for a hearing on this subject. And, I appreciate that invitation and its good to see you again.

You're highly regarded in your professional field Mr. Whitback, and we appreciate you. Did you drive over from Little Rock today?

Mr. WHITBACK. Yes, sir.

Chairman PICKLE. Well, welcome.

Senator PRYOR. Mr. Chairman, before the panel starts their statement could I make a statement about this panel?

Chairman PICKLE. The Chair will yield to the Senator.

Senator PRYOR. Could I have a personal liberty to do that? I just want Congressman Pickle to get to know these individuals as well as Congressman Anthony and I do. In November 1982, Mr. Chairman, I held a hearing on this same subject in Fort Smith, AR. We had about 500 to 700 people, and the Social Security Administration would not send a witness to testify. When SSA found out that these administrative law judges were going to testify at the hearing in Fort Smith, they said that they could only testify at Senator Pryor's hearings if they took annual leave from their jobs to do it.

So, they walked across the street and took leave from their job that morning, and sacrificed a day's pay to testify regarding what they considered to be absolute chaos in a system. They have been reprimanded. They have been kicked. They have been harassed. They have been beat upon. They have been threatened. They have been coerced. They have been ridiculed. They have been undermined. They are brave people who I believe have stood up for the disabled people of our State. And, I just wanted to make that statement. I don't know of braver individuals in the field of public service anywhere, Mr. Chairman.

I just want to say that I'm proud to be associated with them, and they've really tried to do a good job.

Chairman PICKLE. Well, Senator, you not only have recognized their contribution but you certainly have given them a very strong welcome to this hearing.

Senator PRYOR. Well, I'm a little prejudiced in their behalf I might say.

Chairman PICKLE. I can understand that. Now, we're going to hear this panel and we have four individuals. I'm going to ask Judge Thomasson to go first and then Judge Mayhue, Judge Hubbard, and then Minnie Dormois.

The Chair may have to leave the hearing before you have finished, because I must be in Little Rock to catch a plane. Mr. Anthony will take the chair and he and Senator Pryor, I hope, can go ahead and conclude this. But I want you to know we're going to read your statement in its entirety, and we're pleased to have you come here.

I want to say to all the group, this has been a very helpful hearing. I have been impressed with the individuals who have testified and the kind of testimony that they've submitted. I think any time you can get a public hearing in a very useful facility like this rehabilitation center, which has impressed me very much, and when you can attract your Senator and your Governor and your Congressman, and even a Texan, it shows a deep, abiding interest you have in finding some kind of an answer, a better answer to the problem facing this program. So, I thank all of you for coming.

Now, Judge Thomasson, if you would proceed with your statement.

STATEMENT OF JERRY THOMASSON, ADMINISTRATIVE LAW JUDGE, OFFICE OF HEARINGS AND APPEALS, FORT SMITH, AR

Mr. THOMASSON. Chairman Pickle, Congressman Anthony, Senator Pryor, I appreciate the opportunity to be here today.

We have submitted a rather lengthy statement and my comments will be very, very brief. I should say at the outset that Senator Pryor, since we talked with you last, we have seen a spurious document prepared by the Social Security Administration to close the Fort Smith office, and this was a result of they feel like we pay too high percentage of people at Fort Smith.

We also feel like that if it hadn't been for your hearing up there in November 1982, that they would, in fact, have closed the office. We're all very appreciative of your interest in this matter, and the other panelist as well.

We just finished testifying in a lawsuit in Washington, and I hope as a result of that lawsuit many of our concerns concerning harassment and intimidation will be alleviated, but we're still subject to the Social Security Administration as far as our staff is concerned. This presents a problem because the Social Security Administration is very aware of their power in this area.

This program is in utter chaos and I heard the word "anarchy" here this morning by Mr. Spencer. I hadn't heard the word in a long time but that's what it is—anarchy. It's not "nonacquiescence."

If something is not done the Federal courts are going to take the whole matter over here shortly. Many of the Federal courts are already taking the whole matter over. I would just like to, in order to make this brief, I would like to ask you gentlemen two questions. Have you ever thought in the history of the U.S. Government that you would see a time that a Government agency would ask an administrative law judge to violate his oath as administrative law judge, and to violate his oath as a lawyer in order to arrive at a conclusion and a certain percentage of cases to satisfy that administration?

I never thought I would see it, and it makes me sick.

Chairman PICKLE. Have you been asked to do this?

Mr. THOMASSON. Fifty-five percent, I was told not to pay over 55 percent or there would be trouble. I've been threatened with being fired.

Chairman PICKLE. Who threatened you?

Mr. THOMASSON. Bill Lavere, Office of Hearings and Appeals, L-a-v-e-r-e, Office of Appeals Operations. Social Security Administration, OHA, Arlington, VA. Chief Judge Philip Brown told Judge

Mayhue and me that if our trip to Washington for counseling didn't work, something else would be done.

Mr. ANTHONY. Judge, has that been reduced? Apparently that was a part of your lawsuit, but was that reduced to writing?

Mr. THOMASSON. No.

Mr. ANTHONY. It was all just verbal?

Mr. THOMASSON. Yes.

Mr. ANTHONY. So they would have the opportunity to deny it and put you at odds with what they said.

Mr. THOMASSON. Oh, yes, but there was much more to it than that, including the regional chief judge telling me that the Congressman might be happy with our reversal rate but no one else is, and there are people that would like to fire me as administrative law judge in charge and close the Fort Smith office.

And, then he didn't even testify. They didn't call him.

Mr. ANTHONY. So basically what you have is some bureaucrat who's not elected, telling you to disregard the law——

Mr. THOMASSON. That's right.

Mr. ANTHONY. And, do something on a percentage basis, a quota basis?

Mr. THOMASSON. That's right.

Mr. ANTHONY. I'd be indignant.

Mr. THOMASSON. The other thing I would like to ask you, did you ever think that you would ever see the Social Security Administration build walls in its offices all over the United States at great costs, to where an American citizen has to walk down there and push a button like it was a speakeasy and be viewed through a little hole in the wall and then after it was determined he's safe, permitted to enter and talk about his social security matter?

I never thought I would see that either; and, that speaks more eloquently, I think, than anything I could say here today, about what a problem exists in these United States.

I would ask you—we need protection from the Social Security Administration if we're to do what the law wants us to do. We need protection from harassment and intimidation, and we need to be able to control our own staff.

That's the end of my comments.

[The prepared statement follows:]

STATEMENT OF JERRY THOMASSON, FRANCIS MAYHUE, AND DAVID T. HUBBARD, ADMINISTRATIVE LAW JUDGES

Mr. Chairman and members of the Senate and House committees, we are Administrative Law Judges with the Department of Health and Human Services, Social Security Administration assigned to the Office of Hearings and Appeals in Fort Smith, Arkansas. We are here today at your invitation. We appreciate the opportunity to discuss the important issues related to:

(1) The effect on ALJ decision-making of the Social Security Administration's (SSA) policy of nonacquiescence in certain decisions rendered by Federal Circuit Courts of Appeal and U.S. District Courts;

(2) The effect on ALJ decision-making of SSA's recent efforts to establish a uniform standard for determining eligibility for benefits by adopting provisions of the Program Operations Manual System (POMS) in Social Security Rulings; and

(3) Allegations that ALJs have been subject to improper pressures by the SSA agency to decide disability cases in a certain way and at a certain rate.

The Association of Administrative Law Judges, Inc., of which we are members, is an incorporated nonprofit voluntary membership professional association consisting of approximately 600 dues-paying members, all of whom re Judges with the Department of Health and Human Services, serving under the direct delegation of authority from the Secretary of Health and Human Services, and in the manner prescribed by the Administrative Procedures Act (APA). They are charged with the duty and responsibility to hold hearings and make and issue written decisions in appeals from State Agency determinations.

The association is recognized by the Department of Health and Human Services (agency) as a professional association under the provisions of Executive Order 11491. Over the years it has played a critical role in the ALJ system. The agency in the past has sponsored meetings of its officers and directors and consulted with it for purposes of its participation in a meaningful way in the management process of the Office of Hearings and Appeals (OHA). Through its activities its members have attempted to have their views expressed and considered.

In the last few years OHA has significantly curtailed sponsorship by the agency of Association meetings on the basis that budget factors do not permit sponsorship of meetings, and/or granting of administrative leave to Association officers or directors for Association matters. The restrictions placed on the Association by the Associate Commissioner have adversely affected its ability to hold meetings to discuss important problems, and to provide meaningful input to the agency. Communications between the agency and the Association have deteriorated.

The primary purpose of the Association, as set out in its official Bylaws and Charter, is to promote and enhance the legal protections afforded the claimants or litigants under DHHS, SSA, and OHA hearing processes and the Federal Administrative Procedure Act.

In its effort to accomplish this purpose, the Association has promoted opportunities for the continuing professional education and training of ALJs, and has presented seminars at ABA meetings, and in conjunction with the agency has participated in presentation of recent training seminars for the ALJs under agency auspices. Additionally, the Association strives to promote and preserve a professional and judicial approach and attitude among its member Judges that will be conductive to work of a professional nature, and to prevent subjection of the Judges to bureaucratic expediencies which are adverse and detrimental to the rights of the claimants or litigants.

The Association has sought, whenever possible, to improve the working relationships and promote mutual respect between the ALJs and administrative management personnel. It has attempted to provide information that will result in the improvement of working conditions of its members with regard to the utilization of proper and dignified hearing space, adequate office space, and sufficient and appropriate professionals and clerical staff to enable its members to carry out their duties and responsibilities.

The Association has a legislative committee that directs its efforts to work effectively in conjunction with the Congress of the United States, and government personnel agencies, as well as professional associations such as the ABA, ACUS, CALJ, FALJ and the Federal Bar Association. By these efforts the Association works toward the objective of providing and maintaining a fair and just appeals process to the claimants seeking benefits under the provisions of the Social Security Act, and the Social Security Trust Fund as well.

The affairs of the Association are directed by a ten-member Board of Directors, consisting of one director from each of the ten regions of the country (elected by the membership annually by region) and four executive officers, President, Vice President, Secretary, and Treasurer (elected annually by the membership nationally). The Association has in the past and will continue to work with members of your Committee in efforts to resolve the issues you have raised.

The views we express here today as members of the Association reflect the positions taken by the Association on the issues you are studying. The three principal issues we have outlined are significantly related in that they all cause adverse pressures on the ALJs. For reasons that will appear in our report to you, the issues are timely, and this hearing is of critical importance.

HISTORY OF THE PROBLEM

Some background of the problems in the hearings and appeals process must be understood before meaningful discussion of the current circumstances can take place. For that reason we would like to take a few moments to capsulize the events of the past that have led SSA to where it is today in its relationship with the ALJs.

Important events that have occurred in recent years must be considered. Because of an increasing number of requests for hearings (since 1973) by claimants who were dissatisfied with determinations by lower levels of SSA, lack of sufficient number of

ALJs and a temporary loan of all SSA ALJs to the work of hearing cases for the Labor Department in cases involving the Coal Mine Health and Safety Act, a crisis developed in the hearing system represented by a "backlog" of cases. Social Security cases were taking longer to process at the hearing level. The backlog of cases reached a critical point in 1975.

SSA hired management officials reputedly skilled in efficiency measures and management control to increase the decisional output of the Judges. The bottom line was that the decisional output of the Judges was just not enough to deal with the numbers. The newly hired management officials instituted control measures and programs designed to pressure the ALJs into issuing more decisions. Among such programs were encouraging of writing form printed decisions, development short-cuts, setting goals, and then quotas in hearing and case dispositions and gradual removal of the supervisory authority of the ALJs over the staff assigned to them.

The effect of these programs and policies converted the appeals system into a production line. At first the ALJs, recognizing the crisis in the caseload, responded without question to the pressures of management. But, as each plateau of production was reached, the goal or quota was increased. It became apparent that a real interference with the duties and responsibilities of the ALJs was taking place and the ALJs recognized it.

The adverse effects of improper management pressures such as setting goals and quotas in hearings and dispositions and assignment of staff and equipment on the basis of an ALJ's production record are documented for all to see in a survey and issue paper published in January, 1979, by the staff of the Subcommittee on Social Security of the House Ways and Means Committee (96th Congress First Session Committee Print WMCP: 96-2 Social Security Administrative Law Judges Survey and Issue Paper). The conclusion of those hearings was that improper management pressures had been brought to bear on the Administrative Law Judges, and those pressures had adversely affected the fairness of the appeals process in that the quality of the hearing process was sacrificed for quantity.

Shortly after the report was issued the Associate Commissioner was replaced. Other top management officials also were reassigned or departed government service.

In July, 1979, a civil action filed in 1977 by five ALJs seeking injunctive relief from complained-of management practices was settled by court decree approving settlement agreement with the defendant agency. The agency agreed to abide by provisions of the APA and discontinue the complained-of practices in setting quotas of hearings and decisions, failure to rotate cases, and other enumerated practices which were interfering with the ALJs' ability to fairly hear and decide the cases before them. Policy statements of the agency were issued in accordance with the court order. (*Bono, et al.* v. *United States of America, Social Security Administration, et al.*, U.S.D.C. W.D. Mo., 77-0819-CV-W-4)

Although that litigation had been commenced by five individual ALJs, the Association by resolution supported the principles of the litigation and contributed substantial financial support to defray the expenses of the litigation.

The agency had always defended its complained-of policies on the basis that without these improper pressures on the ALJs, they would not work hard enough, the caseload would grow and the agency would not be able to accomplish its mission. The months and years that followed the settlement of the litigation and the abandonment of the complained-of practices proved nothing was further from the truth. The ALJs, free once again to properly perform their duties and responsibilities, increased their decisional output to a point where the "backlog" was ultimately gone, and it was then referred to as a "workload" only.

The next crisis developed in OHA only after the SSA accelerated the mandated Continuing Disability Investigation Program (CDI) by commencing it almost a year earlier than mandated by Congress in the 1980 Bellmon Amendment. As the result of thousands of people being taken off the disability rolls, the number of requests for hearings before the ALJs jumped dramatically. It must be remembered that this increase in requests for hearings occurred not because the ALJs failed to move the cases rapidly enough or in sufficient numbers; it occurred because SSA, in its haste to accelerate the CDI program to take people off the disability rolls and out of benefit status, was not adequately staffed or prepared to conduct such a crash program. As the result of this ill-advised action of SSA, the number of requests were reported for the year 1981 to be 281,737,320,000 in fiscal year 1982, and an all-time high of 363,533 in fiscal year 1983. Furthermore, civil actions filed in the Federal Courts increased by 97 percent during fiscal year 1983 from 12,045 to 23,690. Court remands increased by 40.3 percent during fiscal year 1983, and reversals by the Federal Courts of decisions of the Secretary increased by 52 percent. Since 1977, when the number was 193,657, only 61 ALJs had been added, for a total of 700 ALJs. Dividing the caseload by the number of ALJs, it could be calculated that the cases on hand per Judge at the close of 1981 was approximately 460.

The ALJs had expected a workload increase as the result of the accelerated program. Indeed, officials of OHA had issued memos warning of the forthcoming deluge earlier in the year. Bracing themselves for the increased caseload, the ALJs were additionally pressured by the issuance of a February, 1981, memorandum from the Commissioner of Social Security advising that SSA had interpreted the Bellmon Amendment to authorize them to select Judges on the basis of their high allowance rates for special evaluation and "study" in order to permit the preparation of a report to Congress by January of 1982.

The realization that Judges would be scrutinized on the basis of how many cases they allowed was of extreme concern to many. In official memoranda the agency even referred to the Judges to be studied as "targeted". At that time the President of the Association and other ALJs attempted to arrange a meeting with the newly appointed Secretary of HHS to offer assistance and information as to problems we perceived with the announced review. Many ALJs were also concerned about a series of newspaper articles that reported that high level SSA officials intended to do away with the ALJ appeal system and replace it with hearing examiners housed in the agency and more directly under their control and not under the protection of the APA (Lambro Articles). The Lambro newspaper articles revealed a transition report existed recommending the dismantling of the appeals system and replacement of it with another. (Efforts to obtain the so-called transition report from that day to this by various ALJs and the Association under the provisions of the Freedom of Information Act and otherwise proved totally futile.) If the report could be obtained, it would shed more light on the reason for the problems that have been developing in the appeals process and the attitude of the SSA toward the ALJs.

In July, 1981, a new Associate Commissioner was appointed. Louis B. Hays was appointed to head the OHA. His first official written communication with the ALJs was a memorandum issued July 21, 1981, wherein he expressed his pleasure with being appointed to head OHA, and he ended it by advising the ALJs that they were held in the lowest regard by SSA, the States, the Department, and the Federal Government. He went on to say, "We are perceived by many, rightly or wrongly, as taking unreasonably different approaches to deciding cases, as having untenable reversal (allowance) rates, and being generally unaccountable for our actions. I believe that you and I have a limited time to work together to correct these perceptions before solutions are imposed upon us by outside forces beyond our control." The memorandum added to concerns that the particulars of the Lambro articles were accurate, and further accentuated an attitude that the ALJs were allowing too many claims.

In October, 1981, Judge Charles Bono, President of the Association, appeared before the Subcommittee on Social Security of the House Ways and Means Committee to address various issues with respect to proposed legislation to establish a Social Security Court, and other issues including what measures could be taken to deal with the crisis that was occurring again in the number of cases to be heard by ALJs and resurrected management pressures that threatened the fairness of the system once again. The Association presented a position paper outlining the concerns of the Association with respect to extreme pressures being visited once again on the ALJs. In that position paper a recommendation was made that the ALJs be removed from the control of the SSA, and that failing that, serious consideration be given to amendment of the APA to include enforcement provisions that would guaranteee the ALJs freedom from interference by the agency with their duties and responsibilities to provide fair hearings. The position paper of the Association concluded with this statement: "This committee should be aware that continued friction between administrative law judges on the one had attempting to perform their official sworn duty, and management officials managing the system on the basis of fiscal and numerical considerations is extremely perilous to the fair hearings process."

The newly appointed Associate Commissioner, who had earlier testified at the hearing, exemplified management's determination to revert to management by numbers, when he projected to the Chairman of the Subcommittee his assurance that he could achieve an average decisional output per judge of 45 decisions per month by 1983. At that time such an assurance seemed to us to be wholly unrealistic and contrary to the interests of maintaining a fair hearing process, and still does.

Once again the management officals of OHA embarked upon a program of pressure on the ALJs to make them do more and more, and reappearances of previously discarded objectionable management pressures occurred. Reports increased that many of the provisions of the settlement agreement and the policies issued in accordance therewith were being openly violated by administration management officials. The Association passed resolutions objecting to the renewed pressure but they were either rejected or ignored.

In the early part of 1982, reports were received that OHA was about to file charges against various ALJs seeking their removal from government service on the basis that they had not achieved a certain disposition rate. At a meeting held in New Orleans, the Association inquired of the Associate Commissioner as to the reliability of such reports but he denied their veracity.

In April, 1982, charges were filed with the Merit Systems Protection Board (MSPB) against several ALJs seeking their removal as ALJs on the basis of their failure to achieve an acceptable level of performance in the number of decisions they issued per month. Three of such Judges charged called on the association to intervene in the proceedings on their behalf. The Association attempted to intervene on behalf of its members on the basis that the issues involved in the case would directly affect the other ALJs in DHHS, but the Association was denied status as a party and was permitted only to file amicus briefs at such time and on such issues as determined by the Judge hearing the case. One of the cases has been disposed of by the charged ALJ's acceptance of retirement status. The other two actions, MSPB Case Nos. HQ75218210014 and HQ75218210015 were correctly dismissed recently by the MSPB on the grounds that the agency had failed to prove its case against these ALJs.

As things now stand in OHA, the ALJs have every reason to believe they are being subjected to a rating and evaluation system by their agency, that a standard of performance has been established for them by the agency and a quota in numbers set. The fact that the agency has filed charges against certain ALJs and has officially circulated the recommended decision makes it abundantly clear that the SSA has adopted a policy of rating and evaluating the performance of its ALJs contrary to the specific provisions of the APA and the OPM Regulations. That this policy is being directed and ordered by the Commissioner of Social Security is evidenced by then Commissioner John Svahn's statements contained in the publication entitled "Oasis" (an official publication of the Social Security Administration) in March, 1982, as follows:

". . . I think the hearings and appeals process is moving in the right direction. Productivity of Administrative Law Judges is coming up a little bit. I think we have a right to expect some standardization among our ALJs around the country, and to expect a certain level of productivity."

If the quotas in numbers were not enough the problem is further compounded by the agency's apparent determination to establish a system of rating and evaluating individual ALJs on the basis of their "decisional defects". In a memorandum issued September 24, 1982, the Associate Commissioner revealed a phase of SSA's operations called the "feedback system". Ostensibly as a second phase of the Bellmon Amendment study, it purports to be a system whereby the individual ALJs studied are advised of their "decisional weakness" and provided with "a mechanism for long term improvement". Another part of the memorandum provides for a time table of improvement. Failing improvement with certain steps and after training and counseling, the memo promises other action will be taken but it is not defined.

It is important to keep in mind that the largest group of ALJs under this so-called "Bellmon Review" are those who are "targeted" Judges because of their high allowance rates, even though studies done by OHA Central Office staff showed serious decisional errors by ALJs having low allowance rates.

This memorandum evoked even greater concern among the ALJs in HHS. Association efforts to make the Associate Commissioner appreciate the prohibited nature of these announced actions and to persuade him to take remedial action proved useless. A mailgram was finally sent to the Associate Commissioner officially requesting him to withdraw the memo or correct it and to abandon the announced system. It was sent on November 24, 1982. He did not respond to the mailgram.

Commencing in September, 1982, the Association was compelled to obtain legal advice on the various developments in OHA and in the actions before the MSPB. As matters progressed the Association retained Mr. Elliot L. Richardson of the firm of Milbank, Tweed Hadley & McCloy, Washington, D.C. Based upon the legal advice of that firm, The Association filed a civil action seeking injunctive relief from the actions of the agency as described above. (*Association of Administrative Law Judges, Inc.* v. *Margaret M. Heckler, et al.*, Civil Action No. 83-0124, United States District Court for the District of Columbia.

The action was filed in January, 1983. The defendant agency responded by challenging the authority and standing of the Association to bring such litigation. In March, 1983, the Court issued an Order rejecting the defendant agency's challenge to the Association's standing. A pretrial order issued in this case provided the agency would suspend all complained-of actions regarding the "feedback system" of the Bellmon review study and that the agency would not file any charges with MSPB on the basis of "inefficiency" pending further proceedings. Trail of this action was started on February 28, 1984, and ended on March 13, 1984. Evidence at this trail showed that the Bellmon Feedback Program had developed into a full plan to eliminate the targeted ALJs from federal service. (See Document 2 attached hereto.)

Furthermore, the evidence showed that Associate Commissioner Hays' Performance Plan (his contract under the Senior Executive Service) from April 1, 1982 to September 30, 1982, included the following provision: ". . . One result of these steps will be some reduction in the ALJ allowance rate." (emphasis added) (See Document 3 attached hereto.) His Performance Plan from October 1, 1982 to September 30, 1983, included the following language: ". . . One result will be some further reduction in the ALJ allownace rate." (emphasis added) (See Document 4 attached hereto.)

The sole defense offered in this case by the defendants was that no ALJ had been fired or had his pay cut, and that no one had been hurt. The great weight of all the evidence has shown that many claimants unable to defend themselves have been wrongly treated and have been denied due process of law by this Administration. (*Mental Health Association of Minnesota* v. *Heckler*, 554 F.Supp. 157, 720 F.2d 965 (8th Circuit 1983); *City of New York, et al.* v. *Heckler*, U.S. District Court, E. District of New York, No. CV-83-0457, 1/11/84; *Slay* v. *Heckler*, U.S. District Court, N. District of Alabama, Middle Div., No. CV-83-AR-0182-M. 12/28/83.

With the background given, it is appropriate to treat in more specific detail the issue of allegations that ALJs have been subject to improper pressure by the Social Security Administration as our first topic upon which we will focus our testimony.

I. IMPROPER PRESSURES

At the present, management pressures to influence the number of decisions issued by ALJs each month and the percentage of those cases allowed and denied take many forms. Specific examples of such pressures include the following management practices:

(1) Establishing and maintaining an elaborate and costly statistical tracking system which records individuals ALJs performance by personal identifier on a monthly basis, including the number of hearings held per month, the number of decisions issued per month, the number of allowances issued per month, the number of dismissals issued per month and the percentage of allowances per month, all for the purpose of ranking, rating, and evaluating the performance of individuals ALJs in comparison with national averages;

(2) Using such information as a basis of praising and rewarding certain judges who produce a high number of decisions as compared with national averages, without regard to quality, justness, fairness, or how well-considered or accurate those decisions might be or how adequately the evidentiary record is developed;

(3) Using such information and statistics in determining a standard of performance for ALJs and whether an individual ALJs performance is acceptable to the agency;

(4) Punishing or disfavoring those ALJs who fail to meet quantity standard or quotas of cases to be heard and decided, by refusing to assign them adequate staff while giving perference to other ALJs in availability of staff and improved word processing equipment;

(5) Making travel authority contingent on scheduling a specified number of cases in a given period of time;

(6) Establishing quantitative standards of performance for professional staff members (attorney advisors) who are charged with the duty and responsibility to assist the ALJ in the preparation of cases and issuance of decisions, contrary to the exempt status that such professionals are entitled to in order to permit them to do a quality job;

(7) Establishing unreasonable and arbitrary quantitative standards of performance for other staff members to whom the ALJ must delegate the function of proper preparation and development of a case file for hearing;

(8) Selecting individual ALJs for special study, evaluation and counseling on the basis of the number of claims they allow and advising all ALJs that judges who

allow more claims than the national average are more "decisionally defective" than judges who allow less claims, and virtually ignoring those ALJs with low allowance rates;

(9) Establishing a rating and evaluation system of ALJs selected under the Bellmon review on the basis of their allowance rates by and through management officials and announcing that management officials would be making determinations as to the overall judicial performance of the selected ALJs, counseling them, advising them in correcting their "defective judicial performance", and taking other action if they do not "improve";

(10) Establishing illegal, unannounced, unauthorized, arbitary, and capricious performance standards for ALJs in terms of average monthly dispositions;

(11) Initiating actions to remove ALJs with the MSPB in violation of the official regulations of the Office of Personnel Management and the APA;

(12) Issuing low production warning letters to ALJs who fail to meet certain levels of production and advising them that further action will be taken if they do not increase their production;

(13) Advising certain ALJs that they were allowing too large a percentage of claims, and that they must reduce the percentage of claims they are allowing;

(14) The reconfiguration of hearing office staff there by removing support staff from the supervision of an ALJ;

(15) Establishing productivity quotas for support staff in order to put pressure on the ALJ to hold more hearings and issue more decisions; and

(16) The establishment of a program to prevent the ALJ from using his trained Hearing Assistant (hearing reporter) and requiring him to use an untrained hearing reporter at hearings held outside his assigned office.

The effects of these pressures are obviously adverse. ALJs who have grown tired of the constant state of crisis perpetuated by such improper management pressure are leaving OHA and seeking employment in other agencies that permit them to have the decisional independence guaranted by the APA. Those who do not have the alternative of leaving and cannot accept the interference visited on them are forced to spend inordinate amounts of time in registering protests to the various management pressures and in attempts to mitigate the adverse effect on the fairness of the hearings they hold and the decisions they issue.

The ALJs who have been charged on the basis of unofficial and illegal standards of performance before the MSPB are exhausting their physical and financial resources in defending themselves. The Association has been required by the intolerable state of affairs to hire attorneys in Washington, D.C., and file action in the United States District Court for an injunction and declaratory judgment to prevent the continuance of these improper pressures. The costs to the individual members of the Association and to the Association have been great, both in money and in morale.

An independent survey was mailed to 728 ALJs in the DHHS for completion and return in the latter part of 1982. Sixty-nine percent of those ALJs surveyed responded (an unusually high rate of response and indicative of the strong feelings of the majority of the ALJs). Seventy percent of the ALJs indicated they believed there was agency pressure on them to disallow claims. Sixty-nine percent admitted that the quality of their decisions has suffered because of management pressure to dispose of more cases. Ninety-two percent disagreed with and opposes any quota or evaluation system by the agency. Seventy-seven percent supported the establishment of an independent administrative review commission, and eighty-three percent supported the concept of a separate corps of ALJs.

The results of this survey totally contradict continuing representations being made by SSA in the past few years that the apparent unrest and dissatisfaction in the appeals process is attributable to only a few dissatisfied or complaining ALJs. Quite the contrary is true.

II.—NON-ACQUIESCENCE

This policy does have a significant adverse effect on the ability of the ALJs in DHHS to apply the Social Security Act and the Regulations, because it prohibits the ALJs from taking into consideration interpretations of the Social Security Act and the Regulations by the Federal Courts. This policy is not compatible with well established principles of American Jurisprudence. Practically speaking, it results in the relitigation of claims upon Court remand with unneeded additional costs, and also causes similar cases to be appealed that would not have been had the ALJ been free to apply the law as interpreted by the Federal Courts.

In many instances ALJs are required, in following such nonacquiesence policies, to deny meritorious claims that they know will be allowed upon appeal to a United States District Court or remanded for rehearing. The policy permits the SSA to totally ignore the interpretations of the law as announced by the Federal Courts in all but the actual case decided. It permits the agency to continue to enforce its policies and interpretations of the law, even when there is clear indication from the Federal Courts that such policies and interpretations are contrary to the law.

The objectionable features of this policy which adversely affect the ability of ALJs to provide fair hearing are as follows:

(1) Such policy prohibits the ALJ from applying the law to the facts of the particular case before him, as interpreted by the Federal Courts in the regions in which he hears cases;

(2) If the ALJ ignore the interpretations of the Federal Court and applies the policy of nonacquiescence, the case will most likely be remanded on appeal to the United States District Court whose interpretations have been ignored with the result that the case is required to be heard and decided twice, instead of once;

(3) If the ALJ ignores the nonacquiescence policy of the SSA and applies the interpretations of the Federal Court to the facts of the case, chances are that on review by the Appeals Council (a body of 14 non-APA members sitting in Washington) his decision will be vacated and the case remanded to him with instructions to retry the case and apply the policy of the SSA to the exclusion of the interpretations of the Courts on that particular issue of law.

The Federal Courts have recognized the difficult position in which this places the ALJ and have indicated the danger of such a policy. In the case of *George W. Hillhouse* v. *Patricia Roberts Harris, Secretary of Health and Human Services,* 547 F.Supp. 88, 715 F.2d 428 (1983), the District court recognized the difficulty for the ALJ in stating:

"The court realizes that ALJs are in an awkward position. They are trying to serve two masters: The courts and the Secretary of Health and Human Services. The task is not easy . . ."

The Court went on to quote from *Marbury* v. *Madison*, I Cranch 137, 177 (1803): "It is, emphatically the province and the duty of the judicial department, to say what the law is." then added, ". . . and the Secretary will ignore that principle at his peril."

The case was affirmed on appeal by the Eighth Circuit with the following language:

"Although we need not decide the issue in this case, we note the Secretary continues to operate under the belief that she is not bound by district or circuit court decisions. In its findings the Appeals Council states, 'the Secretary is bound only by the provisions of the Social Security Act, regulations and rulings, and by United States Supreme Court decisions. A *district* or *circuit* court decision is binding only in the specific case it decides.' 547 F.Supp. at 92 (emphasis added).

"In a similar controversy with the National Labor Relations Board the Third Circuit discussed the precedential value of circuit court opinions on administrative agencies:

"A decision by this court, not overruled by the United States Supreme Court, is a decision of the court of last resort in this federal judicial circuit. Thus our judgments * * * are binding on all inferior courts and litigants in the Third Judicial Circuit, and also on administrative agencies when they deal with matters pertaining thereto."

In a concurring opinion, Judge McMillan stated:

"While I concur wholly in everything said in the majority opinion, I think more is needed to be expressed. I have no wish to invite a confrontation with the Secretary. Yet, if the Secretary persists in pursuing her nonacquiescence in this circuit's decisions, I will seek to bring contempt proceedings against the Secretary both in her official and individual capacities."

The policy of nonacquiescence is also objectionable separate and apart from considerations of the extreme adverse effects it has on the ability of an ALJ to peform the duties and functions of his office. It is also ill-advised and objectionable for the following reasons:

(1) It ignores the rule of Stare Decisis upon which American Jurisprudence is based;

(2) It threatens the balance of powers among the Executive, Legislative, and Judicial Branches of the government by permitting the Executive Branch to ignore the laws of the land and the intent of Congress as interpreted by the judiciary;

(3) It denies equal protection of the laws to claimants, since only those with the persistence and financial ability to appeal their cases to the United States District

Court receive the benefit of the Court's interpretation of the laws passed by Congress;

(4) It is totally repugnant to the duty and responsibility of ALJs who, as lawyers, members of the bar, and Judges, are sworn to uphold the law of the land as enacted by Congress and interpreted by the Courts;

(5) It results in relitigation of cases at great administrative cost to the American taxpayer; and

(6) It unjustifiably delays claimants in receiving benefits they ultimately are entitled to when the cases reach the Federal Courts, when they should have received justice in the administrative proceedings without the cost and emotional hardship caused by appealing cases to the United States District Court.

III.—RULINGS (POMS)

Recently, the Social Security Administration has issued Social Security Rulings as a method of establishing a single set of standards or criteria of disability to be applied by all components of the Social Security Administration, including the Administrative Law Judges. These Rulings incorporate policies of the Social Security Administration establishing standards of disability not found in the Social Security Act, nor in the officially published Regulations of the Secretary. These rulings are for the most part conversions of the previous Social Security Program Operation Manual System Part 4 (POMS). Whereas those standards and criteria were previously applicable only at the lower levels of determination in the Social Security Administration, the issuance of them as Rulings makes them binding and applicable at all levels.

The POMS contains the standards which led to the "horror stories" of disabled individuals arbitrarily purged from the Social Security disability rolls widely publicized by newspaper headlines such as: "In the New Rush for Budget Savings, a Life is Trampled"; "Death Drops Curtain on Fight to Keep Benefits"; "Government Sued Over Suicide"; "Social Security Pulls Wheelchair Out From Under Some Cripples"; "Life Lost in Social Security Numbers Game"; "Shame! Death by Regulation and Other Social Security Tragedies"; "Witnessing the Worst Thing Social Security Has Done."

These headlines represent only a few of those being seen throughout the country. Congress passed legislation recently to enable the claimants to financially survive while they follow the appeals process and hopefully have their benefits restored, but the new Rulings attempt; to assure that such "horror stories" will not be reversed by ALJs in the future.

In several areas these Rulings are substantially more restrictive in defining the elements of disability than the Social Security Act or the Regulations of the Secretary. For example, 20 CFR 404.1520 provides a disabled individual must have a severe impairment which significantly limits his physical or mental ability to do basic work activities. SSR 82-55 specifically lists medical conditions that are deemed to be "not severe" and not expected to produce symptoms of severe and prolonged pain. Listed impairments include osteoarthritis corroborated by x-ray findings with symptoms of pain and stiffness of lumbar or cervical spine or major joints and minimal findings on physical examination, traumatic fracture of a vertebral body with loss of less than 50 percent height of vertebra without significant physical findings or neurologic abnormalities, excision of lumbar disc with no ongoing significant motor abnormalities or significant abnormal physical findings, colostomy with proper function of stoma and nutrition adequately maintained, and IQ of 80 or greater. The list is blatently arbitrary and artificial, and obviously designed to tighten the definition of disability. In effect they require the ALJ to ignore symptoms of pain, even if significant medical conditions exist, and to ignore court decisions which require the assessment of pain absent supporting medical evidence.

SSR 82-30 specifically sets out the residual functional capacity which should be found attendant to specified physiclal conditions. Regulations of the Secretary, 20 CFR 404.1546, specifically provides that the determination of residual functional capacity rests with the ALJ or the Appeals Council. Application of the previously mentioned SSR 82-30 results in the determination being made, not by the ALJ who hears the testimony and reviews the evidence, but by an artificial set of standards predetermined by some unnamed person who concluded that a claimant with certain conditions will always have certain capacities. In effect, the Ruling takes from the ALJ the decisional independence to decide the residual functional capacity.

The above are examples of but a few of the substantive defects in these Rulings. The issuance of these Rulings is also procedurally defective in that the requirements of the APA with respect to the publication of Regulations by agencies have been ignored. The conversion of the POMS into binding Rulings was accomplished without publication for public comment, as required by the APA, and represents a serious erosion of the public participation principle.

Advanced copies were sent to the Association for comment. Inadequate time was given to circulate the proposed Rulings to all officers and members of the Board, study them, and reply. Additional time was requested but denied. As a result, the Rulings were published without benefit of any comments or objections the Association or the ALJs might have had. Even had the Association been given more time, the major defect of the procedure in issuing these Rulings was that it deprived the public of its right to oppose such codifications of policy.

CONCLUSION

The fairness of the appeals process in the Office of Hearings and Appeals has been seriously compromied by improper pressures for production at the expense of quality, by improper pressures to deny claims, by enforcement of a policy of nonacquiescence in court decisions unfavorable to the SSA, and by issuance of Rulings which conflict with the Act and Regulations, more strictly define disability, and reduce the discretion of the ALJs.

The question remains, how do we effectively reverse the trend and restore fairness to the system? The Association for its part has in the past attempted to resolve the problems by passing resolutions of protest, doing its best to bring to the attention of the administration the dangerous nature of the management initiatives, and when all else failed, seeking relief in the United States District Court in Washington, D.C. The Association attempted to intervene in the MSPB proceedings as a directly affected party on behalf of all ALJs in HHS, but was denied intervenor status and permitted only to file a brief as "amicus curiae". Now it waits for injunctive relief, which may or may not come soon, if at all. Although these actions by the Association are burdens willingly carried because of the vital principles at stake it is unfair to the Association and the individual ALJs to expect them to remedy these serious problems alone.

Even should the Association be successful in court, there is no guarantee that a court decree will solve the problem for long. Court decrees have been entered before but the agency has refused to comply with the dictates of the court decree, or the specific provisions of the APA, or the official Regulations of the Office of Personnel Management. For that reason, the Association has offered to provide assistance and information to various members of Congress who are considering proposing legislation to create an Administrative Review Commission and other measures to remove the ALJs from the dominion of the agency and restore to them the ability to perform their duties and functions in an atmosphere of decisional independence.

The Association has previously indicated its support for a unified corps concept that would place all ALJs in one unified corps separate and apart from the agencies whose cases come before them. On May 12, 1983, Senator Heflin of Alabama introduced Senate Bill S. 1275 and we concur in the objective of that legislation. Senator Pryor of Arkansas has introduced S. 1911 which is an Administrative Review Commission Bill pertaining only to the Judges in the Department of Health and Human Services which would establish an independent forum of ALJs in the Department of Health and Human Services. That Bill would separate the Office of Hearings and Appeals from the Social Security Administration and redesignate it as an independent review commission responsible for hearing all DHHS cases. This action would be consistent with the organizational structure in other agencies utilizing ALJs and would inclur no additional cost to the government. The status of that proposed legislation is not clear at the time of this presentation, but we have hopes that such measures will find some support and move forward.

Although the APA exists and there are official Regulations of the Office of Personnal Management that would seemingly prohibit what is happening, the sad truth is that the ALJs have no protection. The written provisions of the APA and the Regulations of the Office of Personnel Management seem to have no effect without appropriate legislation to establish meaningful enforcement provisions.

In closing, we would urge these Committees to strongly consider immediate legislative action that will fill the need for protection of the decisional independence of the Administrative Law Judges in the Social Security Administration from further erosion. It is needed to assure the Administrative Law Judges that they will be granted the latitude and authority to carry out the duties and responsibilities of their positions as Administrative Law Judges pending ultimate separation from the agency.

Documents in support of this statement and referred to herein are attached.

Thank you for your time and attention today.

AFFIDAVIT OF JERRY THOMASSON, ADMINISTRATIVE LAW JUDGE IN CHARGE, FORT SMITH, AR

Comes Jerry Thomasson, after being duly sworn upon oath, and states:

1. I am an Administrative Law Judge employed by the Office of Hearings and Appeals, Social Security Administration, Department of Health and Human Services.

2. I am a member of the Association of Administrative Law Judges within the Department of Health and Human Services.

3. In my position as Administrative Law Judge, I am also the Administrative Law Judge In Charge of the Fort Smith, Arkansas, Hearing Office.

4. I have been subject to harassment and intimidation since December 1981. In December 1981, Don Prezbylinski, a special assistant to Louis B. Hays, Associate Commissioner of the Office of Hearings and Appeals, appeared at my office without notice. He advised me he had been sent by Mr. Hays to conduct an investigation of the office and further advised me that there would be no peace in the Fort Smith office until the Administrative Law Judges in the Fort Smith office had satisfied Martha McSteen, Regional Commissioner of the Dallas Region of the Social Security Administration, that our reversal rate had been substantially reduced.

5. In January 1982, I was summoned to Washington for "continuing education," and while in Washington I was advised by Bill Levere, a management employee of the Office of Hearings and Appeals, that a reversal rate of 45 to 55 percent was acceptable and that the reversal rate of the Fort Smith office, and particularly my reversal rate, was unacceptable.

6. I was again summoned to Washington in May 1982, and during my visit to Washington I was required to sit in four one week of training with a new class of Administrative Law Judges. In a conversation with Irwin Friedenberg, Deputy Chief Administrative Law Judge, Judge Friedenberg stated:

"There must be something wrong in the Fort Smith Hearing Office with so many people being paid."

7. From August 17, 1981, until July 1, 1982, I was under 100 percent review by the Appeals Council. This means that every decision, whether it be an affirmation, reversal or dismissal, was reviewed by the Appeals Council. This was subject to Order by Chief Judge Philip T. Brown. A copy of Judge Brown's Order is attached as Exhibit 1.

8. On August 27, 1982, I was notified by Judge Brown that I had been removed from 100 percent review by the Appeals Council and placed under "Bellmon Amendment" review (Exhibit 2). This means that all reversal decisions have been reviewed by the Appeals Council pursuant to section 304 of Public Law 96-265, commonly known as the Bellmon Amendment. A copy of this Public Law is attached as Exhibit 3. The Bellmon Amendment provided for ongoing review of decisions by Administrative Law Judges, but the Appeals Council adopted a policy of reviewing only reversal decisions wherein the Administrative Law Judge granted benefits to a claimant as opposed to a denial decision issued by an administrative Law Judge. I am convinced that 100 percent of my reversal decisions have been reviewed by the Appeals Council and my reason for this belief is contained in a memorandum from Louis B. Hays to all Administrative Law Judges, dated September 24, 1982. A copy of this memorandum is attached as Exhibit 4.

9. In October, 1982, I was attending a Management Seminar in Dallas, Texas, wherein I was told by Harold Adams, Regional Chief Administrative Law Judge, that "the congressman may be happy with the reversal rate in the Fort Smith Hearing Office, but I can assure you that no one else is". In my conversation with Judge Adams, he indicated that there was serious thought in Washington being given to closing the Fort Smith Hearing Office.

10. On December 29, 1982, Phillip T. Brown, Chief Administrative Law Judge, directed a letter to me which states:

"As you know, Section 304 of PL 96-265, generally referred to as the Bellmon Amendment, requires an ongoing review of ALJ decisions. In its review, the AC has taken its own motion action in a number of decisions you recently issued. Essentially, the problems identified concern or are related to your evaluation of 'disability'.

"We firmly believe that a system of timely information feedback is an effective training device to assist an ALJ in mastering claims adjudication policies, procedures, and techniques. You will be contacted in the near future by the Regional Chief Administrative Law Judge concerning an informational session in which the identified problems will be discussed. Deputy Chief ALJ Irwin Friedenberg will be present at the meeting.

"Our objectives are to provide individual guidance and to improve the overall quality and consistency of the decision making process. Peer counseling is a fundamental part of achieving these goals."

11. Following the receipt of this document I directed a letter to Judge Brown asking him for his statutory authority for the "peer counseling" as provided in his December 29, 1982, letter. To date Judge Brown has not responded although Judge Brown has received the letter. A copy of the letter, as well as a copy of the return receipt, are attached hereto as Exhibit 5.

12. On January 10, 1983, I was advised that I will be expected to appear in Dallas, Texas, on January 19 or January 20, 1983, for the purpose of "peer counseling", and the "peer counseling" will be conducted by Regional Chief Administrative Law Judge Harold Adams and Deputy Chief Administrative Law Judge Irwin Friedenberg. I am convinced that the current directive to attend the peer counseling is an action to harass me and is intended to affect my decisional independence, and the sole reason is to cause me to allow fewer claims. This violates my decisional independence and my rights as provided for by the Administrative Procedure Act as codified in Title V of the United States Code.

This statement is given me on this 11th day of January, 1983.

JERRY THOMASSON,
Administrative Law Judge.

Subscribed and sworn to before me this 11th day of January, 1983.

CATHY A. HICKS,
Notary Public.

My commission expires July 8, 1990.

Refer to: SGA3

Memorand

Date: JUL 29 1981

From: Office of the Chief Administrative Law Judge

Subject: Appeals Council Review of ALJ Decisions--ACTION

To: Administrative Law Judge in Charge
Administrative Law Judges
Fort Smith Hearing Office

During the visit of the Deputy Chief Administrative Law Judge in December 1980, collectively you advised him that you would consider Appeals Council review of your decisions an appropriate manner in which your adjudicatory practices could be evaluated. The Appeals Council, effective August 17, 1981, will review all decisions of ALJs in the Ft. Smith office.

Effective for decisions issued August 17, 1981 and until further notice you should begin the following procedures to effect this process:

> Forward all (i.e., Dismissals, Affirmations, Partial or Fully Favorable Allowances) claim files with cassettes to:
>
> Office of Hearings and Appeals
> Social Security Administration
> Post Office Box 1207
> Arlington, Virginia 22210

You can be assured that your decisions will be handled expeditiously and that any delay in effectuating a favorable decision will be held to a minimum.

Philip T. Brown
Philip T. Brown
Chief Administrative Law Judge

Refer to: SGR2

Memorandum

Date: AUG 27 1982

From: Chief Administrative Law Judge

Subject: Ongoing Review Directed by Section 304(g) of P.L. 96-265 -- ACTION

To: Jerry K. Thomasson
Administrative Law Judge In-Charge
Fort Smith, AR

PURPOSE

This is to advise you of new procedures to follow in referring your cases to Central Office for review. Effective September 1 and until further notice, you should forward only your reversal decision cases involving title II and concurrent disability issues to the Office of Appraisal for review under the Bellmon Amendment. All other types of reversal cases, as well as affirmation and dismissal cases should be processed routinely, in accordance with the OHA Handbook instructions.

The following instructions should be followed by your staff in releasing all your favorable title II and concurrent cases involving the issue of disability. These instructions apply only to disability issue reversal cases. If disability was not at issue in the hearing decision, for example, if workmen's compensation offset or entitlement of a dependent child whose entitlement was not contingent on his/her being disabled, etc., was the issue in the decision, that case should not be referred to OHA.

INSTRUCTIONS

1. Partially and fully favorable title II and concurrent disability issue cases are to be processed in the normal manner through the issuance and mailing of the hearing decision.

2. The case control instructions outlined in the OHA Case Control System Manual for the posting of the HA-670 control card and the SSA-672 coding sheet will be followed in these cases; enter location code 5950 in "CTT" on both the control card and the coding sheet on the 335 action. Location code 5950 will flag the Case Control System that the case has been selected for Bellmon review. (Note: In some concurrent cases, a reversal decision may be issued on only one part. Follow the above instruction for both parts). All cases referred to Central Office for this review, must include the appropriate copies of the HA-670 control card in the claim file(s).

3. Hearing cassettes are to remain with the claim folder in the cassette envelope for all cases referred to Central Office for this review. The cassette(s) are to be placed in the title II folder in concurrent cases. (AMSARS procedures now being piloted experimentally in selected locations will not apply in these instances). The cassette(s) must be sent with the claim file.

4. Routing of title II only cases: A form HA-5051 is to be stapled to the outside of the claim folder directing it to its normal effectuating component. On top of this route slip (HA-5051) to the effectuating component, staple a form HA-505 directing the claim folder to OHA, P.O. Box 1207, Arlington, VA 22210.

5. Routing of concurrent cases: The two claim folders are to be split and set-up for release in the normal manner, with appropriate photocopies placed in the SSI folder. Prepare a form HA-5051 for each folder, directing it to the proper effectuating component, and staple it to that folder. Use rubber bands to keep both the title II and SSI folders together with the title II folder on top for sending to CO. Please do not staple them. Prepare a route slip, form HA-505, directing the combined files to OHA, P.O. Box 1207, Arlington, VA 22210, and staple it on top of the HA-5051 to the effectuating component on the title II file. Release the files together as indicated above to Central Office. Further routing to the appropriate effectuating components will be done, based on your pre-prepared HA-5051 route slips.

6. The person(s) in the office responsible for releasing the folders will complete a HO/ALJ Report (see copy attached) for each case or group of cases he/she is referring to OHA. Care should be taken to make sure that these reports are legible. Please supplement the attached forms with photocopies until you receive a printed supply. The HO/ALJ Report is to be released at the same time the folder or folders are released. The HO/ALJ Report is to be mailed to: OHA, Office of Appraisal, Attn: Margie David, P.O. Box 1207, Arlington, VA 22210. The envelope should carry a DO NOT OPEN IN MAILROOM annotation. A HO/ALJ Report should accompany every case or group of cases mailed to CO.

7. All applicable cases and HO/ALJ Reports referred to above must be forwarded immediately upon release of the decision. If several decisions are released at the same time, then those cases may be grouped for mailing on the same day. Otherwise, do not hold a case for group mailing to Central Office, send it alone with a report.

8. Post decision correspondence is to be handled in accordance with present instructions.

I appreciate your cooperation in this matter. If you have any questions regarding these instructions, please contact Margie David at FTS 235-1814.

Philip T. Brown
Philip T. Brown

Attachment

cc:
RCALJ

(d) In any case in which any person who as of December 31, 1978, is entitled to receive pension under section 521, 541, or 542 of title 38, United States Code, or under section 9(b) of the Veterans' Pension Act of 1959, elects (in accordance with subsection (a)(1) or (b)(2), as appropriate) before October 1, 1979, to receive pension under such section as in effect after December 31, 1978, the Administrator of Veterans' Affairs shall pay to such person an amount equal to the amount by which the amount of pension benefits such person would have received had such election been made on January 1, 1979, exceeds the amount of pension benefits actually paid to such person for the period beginning on January 1, 1979, and ending on the date preceding the date of such election.

(e) Whenever there is an increase under subsections (a)(3) and (b)(4) in the annual income limitations with respect to persons being paid pension under subsections (a)(2) and (b)(3), the Administrator of Veterans' Affairs shall publish such annual income limitations, as increased pursuant to such subsections, in the Federal Register at the same time as the material required by section 215(i)(2)(D) of the Social Security Act is published by reason of a determination under section 215(i) of such Act.

* * * * * * *

[*Internal References.*—Social Security Act § 1133(a)(1) cites § 306 of the Veterans' and Survivors' Pension Improvement Act of 1978 and Social Security Act § 215(i)(4) has a footnote referring to this public law.]

SOCIAL SECURITY DISABILITY AMENDMENTS OF 1980

P.L. 96-265, Approved June 9, 1980 (94 Stat. 441)

Sec. 1. [42 U.S.C. 1305 note] This Act may be cited as the "Social Security Disability Amendments of 1980".

* * * * * * *

Sec. 201. * * *

(e) [42 U.S.C. 1382h note] The Secretary shall provide for separate accounts with respect to the benefits payable by reason of the amendments made by subsections (a) and (b) so as to provide for evaluation of the effects of such amendments on the programs established by titles II, XVI, XIX, and XX of the Social Security Act.

* * * * * * *

Sec. 304. * * *

(g) [42 U.S.C. 421 note] The Secretary of Health and Human Services shall implement a program of reviewing, on his own motion, decisions rendered by administrative law judges as a result of hearings under section 221(d) of the Social Security Act, and shall report to the Congress by January 1, 1982, on his progress.

* * * * * * *

(i) [42 U.S.C. 421 note] The Secretary of Health and Human Services shall submit to the Congress by July 1, 1980, a detailed plan on how he expects to assume the functions and operations of a State disability determination unit when this becomes necessary under the amendments made by this section, and how he intends to meet the requirements of section 221(b)(3) of the Social Security Act. Such plan should assume the uninterrupted operation of the disability determination function and the utilization of the best qualified personnel to carry out such function. If any amendment of Federal law or regulation is required to carry out such plan, recommendations for such amendment should be included in the report.

* * * * * * *

TIME LIMITATIONS FOR DECISIONS ON BENEFIT CLAIMS

Sec. 308. [42 U.S.C. 401 note] The Secretary of Health and Human Services shall submit to the Congress, no later than July 1, 1980, a report recommending the establishment of appropriate time limitations governing decisions on claims for benefits under title II of the Social Security Act. Such report shall specifically recommend—

(1) the maximum period of time (after application for a payment under such title is filed) within which the initial decision of the Secretary as to the rights of the applicant should be made;

SJR1

Memorandum

SEP 24 1982

Associate Commissioner
Office of Hearings and Appeals

Description of the Bellmon Own-Motion Review Program — INFORMATION

All Administrative Law Judges

The purpose of this memorandum is to provide you with an overview of the Bellmon review as it is now functioning and the results of the review.

The ongoing review of hearing decisions under the Bellmon Amendment is intended to promote greater consistency and accuracy by identifying and correcting those decisions that do not comply with the applicable provisions of the law, regulations and Rulings. Under the Bellmon review program, the Appeals Council, on its own motion, formally reviews ALJ decisions that do not appear to be correct and, where the decision is incorrect, either reverses the ALJ's decision or remands the case to the ALJ for further proceedings. (For a more complete description of the procedures used by the Appeals Council, see Social Security Ruling 82-13 published in the January 1982 compilation of the Rulings.) This program results from Congressional concerns about the high overall percentage of cases allowed at the hearing level, the wide variance in allowance rates among individual ALJs, the fact that only ALJ decisions denying benefits were generally subject to further review, and the inconsistencies noted in decision-making at the different adjudicatory levels.

The initial phase of the pre-effectuation ongoing review program, which started October 1, 1981, was limited to approximately seven and one-half percent of all Title II and Title II/XVI concurrent disability allowance decisions issued by a group of hearing offices (HOs) and individual ALJs selected on the basis of allowance rates of 70 percent or higher, and 74 percent or higher, respectively. Allowance rates were used as the basis for selecting the initial review group, both because of Congressional intent and because studies had shown that decisions in this group would be the most likely to contain errors which would otherwise go uncorrected. Rather than reviewing all disability allowance decisions produced by these HOs/ALJs, a decision was made to review half of the group's allowance decisions in order to increase the total number of ALJs under review and thereby enhance the overall effectiveness of the review. The initial selection procedure was designed to yield a group of hearing decisions for review which were likely to be among the most error prone and thus to make the most efficient use of resources while correcting the greatest number of faulty hearing decisions.

On April 1, the Bellmon review was enlarged to include 15 percent of ALJ disability allowance decisions, and the case selection criteria for the Bellmon program were redesigned and expanded. Under this expansion, the group of ALJs selected on the basis of high allowance rates is just one of several components of the review. A national random sample of ALJ allowances, without regard to any ALJ's allowance rate, now accounts for 25 percent of the total reviewed cases. The expanded Bellmon review also includes cases identified and referred to the Appeals Council by the Office of Disability Operations (ODO). In addition, a review of decisions from new ALJs is included in the program. One other change has been to remove entire hearing offices from the review.

The following is a summary of the four aspects of the Bellmon review:

- Random Sample - A national random sample of allowance decisions accounts for 25 percent of the Bellmon cases. These cases are randomly selected and sent to OHA from ODO prior to effectuation. Data from this part of the Bellmon review is especially important as a baseline for comparison with information from the review of individual ALJs. It is also an important means of providing feedback on the quality of decisions to all ALJs and will aid in identifying areas where policy clarification or training is needed.

- New ALJs - The decisions from new ALJs are reviewed until it is determined that each ALJ's work is satisfactory. The review of new ALJs is useful in determining the effectiveness of the ALJ training program, and it enables us to take remedial action, if necessary, at the most opportune stage in an ALJ's development.

- ODO Protests - Disability examiners in ODO are reviewing a sample of ALJ allowances prior to effectuation as part of a pilot project. If a disability examiner believes there is a substantive disability issue in the case which does not comport with the law and regulations, the claim file is referred to OHA and made part of the Bellmon review. The Appeals Council follows standard procedures in deciding whether or not to take own motion.

- Individual ALJs - During the initial phase of the ongoing review, data were collected on own motion rates (the frequency that the Appeals Council takes action to correct an ALJ decision). Based on these data, ALJs are divided into four groups — those on 100 percent review, 75 percent review, 50 percent review and 25 percent review. Generally, as ALJs' own motion rates decline, their level of review also decreases. Continuing modifications are made in the group of ALJs under review and the level of review for individual ALJs. One hundred-six ALJs are included in this portion of the Bellmon review.

Although the allowance rate is the basis for selection of individual ALJs for that portion of the review, this factor receives no consideration in determining whether to remove ALJs from review. Decisional accuracy is the sole criterion, which we have defined as a five percent own motion rate for three consecutive months. In other words, an ALJ with an extremely high allowance rate could ✓ be removed from the Bellmon review if his or her decisions are correct.

Through September 1, we have reviewed 10,560 allowance decisions. The own motion rate for all of these cases is 12.1 percent. However, the rates vary significantly depending on the category of the review. The highest own ✓ motion rate, 50.7 percent, exists in the ODO protests. The next highest category is the group of individual ALJs, 14.2 percent. These rates are contrasted by the rates for the new ALJs, 7.5 percent and the random sample, 5.7 percent.

While the figures cited above are based on the cases where the Appeals Council has completed its action, there are a substantial number of cases pending where the Appeals Council's support staff has recommended that the Council take corrective action and such action has not yet been taken. Since our experience has shown that about 95 percent of these recommendations ultimately result in either reversals or remands at the AC level, it is noteworthy that the overall "recommended" own motion rate is approximately six and one-half percent higher than the actual own motion rate.

In addition to own motion rates, we also maintain information regarding the overall percentage of defective cases. A case is considered defective if the decision contains some type of deficiency — improper basis for disability conclusion, failure to follow sequential evaluation, improper questioning of an expert witness, etc. — yet reaches an ultimately correct conclusion that the claimant is disabled. Through September 1, the overall defect rate was 47.6 percent, with the various category percentages as follows: ODO protests - 91.0 percent; random sample - 52.7 percent; individual ALJs - 49.7 percent; and new ALJs - 30.5 percent. Although the majority of these decisions did not contain deficiencies so severe that an own motion action was recommended, the Social Security Regulations are not being correctly applied in many instances.

An essential requirement to ensure the success of the Bellmon review program is to provide a companion system for providing feedback on the results of the review. While the information we obtain from the review is very helpful in guiding our training and continuing education efforts, I believe there must be a more individualized process for those ALJs in the individual category. Such a system is now being implemented. The purpose of the feedback system is to advise affected ALJs of decisional weaknesses and to provide a mechanism for achieving long term improvement.

Under the first stage of the feedback system the Chief Administrative Law Judge (CALJ) will send a memorandum to the appropriate Regional Chief Administrative Law Judge (RCALJ) enclosing a brief outline of the particular problems found in the decisions of that ALJ. Also enclosed will be summaries of several cases reviewed by the Appeals Council on its own motion with supporting documentation. The RCALJ, together with Deputy Chief Administrative Law Judge Irwin Friedenberg on occasion, will meet with the ALJ involved to discuss the problems reported and review steps that can be taken to improve the accuracy of his or her decisions.

Thereafter, a further review of the ALJ's decisions will be undertaken for three months to determine if there has been improvement. If no change has occurred the CALJ may either request additional counselling through the RCALJ or authorize special training in the region or in Central Office. If there is still no measurable improvement other steps will be considered.

Initially, because of staffing limitations, feedback will be limited to those individual ALJs who are included in the 100 percent review group. As the system progresses, all ALJs remaining in the individual group will be included in this process.

Louis B. Hays

Exhibit 5

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of Hearings & Appeals
616 Garrison Building, Room 203
Fort Smith, Arkansas 72901

January 3, 1983

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Philip T. Brown
Chief Administrative Law Judge
Office of Hearings and Appeals
P. O. Box 2518
Washington, D. C. 20013

Re: SGRI dated Dec. 29, 1982

Dear Judge Brown:

Will you please advise your legal authority for my proposed peer counselling.

Sincerely,

Jerry Thomasson

Jerry Thomasson
Administrative Law Judge

cc:

Harold G. Adams, Regional Chief
Administrative Law Judge

PS Form 3811, Jan. 1979

RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

○ SENDER: Complete items 1, 2, and 3.
Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one.)
   - ☐ Show to whom and date delivered............ ___ ¢
   - ☐ Show to whom, date and address of delivery... ___ ¢
   - ☐ RESTRICTED DELIVERY Show to whom and date delivered............ ___ ¢
   - ☒ RESTRICTED DELIVERY. Show to whom, date, and address of delivery. $ ___

(CONSULT POSTMASTER FOR FEES)

2. ARTICLE ADDRESSED TO: Philip T. Brown
Chief, Admin. Law Judge, OHA
P. O. Box 2518
Washington, D.C. 20013

3. ARTICLE DESCRIPTION:

REGISTERED NO.	CERTIFIED NO.	INSURED NO.
	629071	

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent

4. DATE OF DELIVERY

POSTMARK

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE:

CLERK'S INITIALS

☆GPO : 1979-288-848

MAR 30 1982

6

NOTE TO THE FILE

SUBJECT: Bellmon Feedback Meeting - 3/30/82

The participants at the meeting agreed that the feedback to the administrative law judges concerning the results of Bellmon review of their individual decisions would be in three phases approximately each quarter.

Phase 1 - This would be a memorandum prepared by OA and concurred in by OAO for the CALJ signature to the RCALJ pertaining to an individual ALJ decision review results. The results reported would be developed by an OA analyst analyses of the individual ALJ profile (remand orders and decisions as well as defects discussed in QR forms contained in the individual ALJ file). The memorandum would request the RCALJ to counsel the individual ALJ in accordance with the Associate Commissioner's assignment of counseling responsibilities and request that the CALJ be advised when the counseling sessions were conducted and completed. Larry Tobin is to develop a sample memorandum concerning a Region X ALJ to be forwarded in draft to the RCALJ Region X for review and comment.

Phase 2 - Approximately one calendar quarter after the initial memorandum requesting RCALJ counseling, the individual ALJ Bellmon review results would be reviewed again to determine any changed behavior. Assuming no changed behavior, the OA would prepare a memorandum to the CALJ stating the previous actions concerning the particular ALJ and the results of that counseling; OA would recommend that the CALJ undertake corrective action by either repeated counseling or individual ALJ training at Central Office.

PLAINTIFF'S EXHIBIT 17

DOCUMENT NO. 1 (2 pages)

MAR 3 0 1982

Phase 3 - In the calendar quarter subsequent to implementation of Phase 2, assuming no changed behavior on the part of the individual ALJ, OA would initiate a memorandum to the CALJ recommending that the ALJ file be turned over to the Office of Special Counsel for administrative processing through OPM for appropriate action.

Loyd J. Ogden

DEPARTMENT OF HEALTH & HUMAN SERVICES Social Security Administration

Refer to: SGR1

Memorandum

Date: APR 30 1982

From: Director, Office of
Appraisal

Subject: Work Group Report on Feedback of Bellmon Review Data to Targeted ALJs
(ES-11-20-380) -- DECISION

To: Mr. Louis B. Hays
Associate Commissioner
Office of Hearings and Appeals
Through: ES

PURPOSE

To develop a program for feeding back data derived from the Bellmon review of targeted ALJs.

BACKGROUND

On November 20, 1981, OA forwarded a proposal that individual, computer-generated reports summarizing the results of the Bellmon review be prepared monthly and disseminated to each targeted ALJ. The proposal was circulated among appropriate components. Comments were received from OAO, OPP, OSC, OFA, AC, CALJ, and Mr. Friedenberg. With the exception of the AC, reaction to our proposed report was negative.

The gist of the criticism was that the computer generated reports were too generalized and impersonal. Because of the adverse reaction to our proposal, it was withdrawn in a memorandum dated January 27, 1982. Instead, we proposed the formation of a work group consisting of representatives from OA, OAO, OPP and OFA to study the matter of feedback and report to you with recommendations.

Specifically, the work group was to make recommendations on whether we should: 1) have a direct feedback report to each ALJ targeted for review; 2) issue individualized Bellmon review reports only to the CALJ and/or RCALJs or ALJICs to be used in conjunction with other materials for peer counselling, training or other informational purposes; or 3) adopt some other feedback system.

The work group has completed its study of the feedback question. What follows is a discussion of the group's findings.

DOCUMENT NO. 2 (12 pages)

DISCUSSION

From the outset, the group's concentration centered on a feedback system which will meet the following goals: 1) it must provide information which is sufficiently specific and personalized to be of value; 2) it should facilitate the efforts of persons charged with responsibility for improving the quality and consistency of the decisional process; and 3) it must make maximum use of Central Office resources available for feedback purposes.

Goal I: Specific and Personalized Feedback System

The work group reasoned that reports detailing the findings from the Bellmon review of targeted ALJs were a necessary starting point for the feedback system, and that the information contained in these reports would have to be clear, concise and reflective of the actual review process. The group felt, however, that summary lists of data, by reason of their appearance, complexity and content, would distract the reader from the main purpose of the report - to communicate sufficiently specific information to be of value.

Computer generated reports displaying numeric representations directed to individual ALJs, even with an element of written explanation, were felt to be inappropriate for feedback purposes. The concern was expressed that the computer reports would be scanned when received and then filed away without there being any real cognizance of the problems revealed. Although the computer reports could be individualized in that specific ALJs and case SSN's would be included, it was thought that the impersonal nature of data presented in this way would limit its impact. The group felt that circulation of computer reports should be limited to Central Office.

The group agreed that an analytical memorandum was preferable to computer reports as the principal means for feeding back Bellmon information. The memorandum could then discuss selected cases with descriptions of primary and repeated deficiencies found in review of these cases. Each selected case could also be analyzed in terms of the facts and issues involved and the reasons behind the AC's action. Deficiencies would be discussed in the context of the particular case involved. The reader would know in just what way an ALJ's decision deviated from law, regulation or SSA policy or procedure.

To personalize the feedback mechanism, the work group adopted the suggestion that a single memorandum be prepared to discuss a specific ALJ's performance. If three ALJs are involved, three memoranda would be prepared.

Concision in the memorandum was also discussed. It was thought that too much detail or too lengthy an analysis could detract from the main points which are to be extracted by the reader. The work group felt, therefore, that only selected cases should be covered and deficiency information limited to major points or involve areas in which repeated difficulties have been noted. To aid the reader, though, copies of the particular ALJ's decisions and the Appeal Council's remand order or decision would be attached to the memorandum.

Goal 2: Facilitate Improvements in Quality and Consistency

Your memorandum of January 6, 1982, to all RCALJs placed the burden upon them to "carry out the programmatic responsibilities of improving the quality and consistency of the decisional process . . . ." The work group felt that, in view of this charge, the RCALJs were the logical choice to receive the feedback memoranda.

Instead of sending memoranda to individual ALJs and, in effect, hoping for improvements in performance based upon the strength of the memoranda themselves, RCALJs would be given the supporting documentation and required to take an active role to improve the quality of the decision making process. RCALJs would be asked to counsel the cited ALJs on the problems uncovered in the Bellmon review and to report back the date of the session and an assessment of the effectiveness of the counselling. Also, RCALJs are well placed to close the feedback loop. The group expects that the information fed back to Central Office will contribute to our efforts to improve field performance and efficiency. The work group is strongly of the opinion that direct RCALJ involvment will heighten the chances of effecting real improvements in performance. (See Tab A for a sample of a complete feedback memorandum.)

Because the work group concluded that a continuing process was necessary, it devised a three staged feedback system.

Stage 1 is the initial memorandum covering a particular ALJ's performance. Stage 2 would involve a re-examination of the Bellmon/QR results as a means to gauge an individual ALJ's progress. Stage 3 would be utilized where problems persist.

Stage 1 has already been discussed above.

Under Stage 2, the data would be reviewed three months from the date of the Stage 1 memorandum. If no improvement were seen, the CALJ would be so advised by memorandum. Additional action through either repeated counselling or individual training of the ALJ by the CALJ, the RCALJ or the Appeals Council will be recommended. If, after another quarter elapses from the date of this memorandum and the Bellmon/QR data still showed no measurable improvement, Stage 3 procedures would come into action.

The Stage 3 memorandum, also to the CALJ, would document the continuing problems and the remedies taken. It would recommend to the CALJ that the ALJ's file be forwarded to the OSC for appropriate measures to be taken. It would be left to the CALJ's discretion exactly what those measures will be.

Goal 3: Making Maximum Use of Central Office Resources

The various memoranda to be prepared under the three stages of the feedback system would be prepared by OA for the CALJ's signature. The work group felt that OA was the logical point for originating the memoranda because it is closest to the data.

The work group considered OA resources against the type of memorandum thought necessary for feedback, particularly in Stage 1, and the number of targeted ALJs potentially involved. It was thought that feedback should be limited at first to only those ALJs whose work is currently undergoing 100 percent review (rather than the standard 50 percent review) and such other ALJs as are added to the 100 percent review. Initially then, resources would be focused on our most deficiency prone ALJs. Presently, 16 ALJs are under 100 percent review. A list of these ALJs is included at Tab B.

After the three stage program, if it goes that far, is complete for the first group of ALJs, stage 1 memoranda will be prepared for the next level of review - 75 percent. At present there are 20 ALJs at the 75 percent level of review. After this group is completed, the 50 percent and then the lower review level ALJs will be handled. By addressing targeted ALJs in this manner, the group expects that eventually all ALJs will have been the topic of individualized feedback memoranda. In the meantime, of course, targeted ALJs will be receiving feedback in the form of Appeals Council remand orders and decisions. Also, RCALJs will be receiving copies of OA's quarterly QR/Bellmon reports which will summarize deficiencies broken down by regions.

The work group expects that this "cycle" will have to continue as long as there is a targeted review.

SUMMARY OF RECOMMENDATIONS

The work group recommends that a three tiered feedback system be adopted. The first tier, or stage, centers around an OA prepared memorandum pointing out significant and/or continuing problems in an ALJ's decisions uncovered in the Bellmon review. The memorandum would describe the problems in the context of the actual cases reviewed. A single memorandum will be prepared for each individual ALJ involved. The memorandum will then be sent to the appropriate RCALJ and peer counselling will be requested. The results of the counselling will then be fed back to Central Office. These memoranda will be issued through and over the signature of the CALJ.

Because of OA's limited resources, only those ALJs subject to a 100 percent review under Bellmon will initially be selected for feedback. These ALJs are known to be the most deficiency prone, so correction would yield the greatest immediate payoff. As ALJs are added to the 100 percent review, feedback memoranda will be prepared for them.

A follow-up on the ALJs will be conducted under Stage 2. The review of Bellmon/QR data during the quarter following the date of the Stage 1 memorandum will reveal whether any progress has been made and, as a side benefit, whether peer counselling really is effective. If the sought for improvements are not seen, the CALJ will be involved directly. At this point more counselling might be undertaken or individual ALJ training in Central Office might be preferred. The course of action selected will be up the CALJ. If, after another quarter elapses, there is still no improvement, sterner measures through the OSC will be recommended (Stage 3). Again, the decision will be left to the CALJ.

When the initial group of ALJs completes the three stage program, other groups of ALJs, prioritized by the percentage of cases reviewed under the targeted Bellmon review, will be included in the feedback program until memoranda has been prepared on all ALJs. In the meantime, all ALJs will receive copies of Appeals Council remand orders and decisions. RCALJs will receive copies of OA's quarterly QR/Bellmon reports. The feedback system will continue as long as there is a targeted review.

The work group believes that this feedback system is sufficiently flexible to achieve measurable improvements in the quality and consistency of the decisional products of individual ALJs.

ADDENDUM

We, of course, support the work group's recommendation and firmly believe in the need for an individualized approach to correct the deficient decisional behavior of our most error-prone ALJs. Nevertheless, we are concerned that the limited coverage provided by the system effectively cuts off RCALJs from valuable information concerning the majority of the ALJs targeted for review.

In their preliminary reactions to the work group's proposal, Mr. Friedenberg and OAO echoed this concern. (Their comments are included at Tab C.) OAO also mentioned the possibility that computer generated reports could serve a limited role in the feedback system.

OAO's suggestion appears to be somewhat supportive of our first feedback proposal in which computer reports were to be sent directly to ALJs. Rather than make a formal proposal now discussing the uses of computer reports as a feedback tool, we would prefer to study the matter further and prepare another paper on the subject once we have some experience with the new quality review forms.

DECISION

The feedback system as outlined above will be implemented.

APPROVE RBH – However, I want the stage 1 memos to be cleared by OAO & AC, & I want OA to explore the recommendation to use the computer-generated reports for non-targeted ALJs and perhaps as an interim measure for the 25 to 75% review group
DISAPPROVE __________
OTHER __________
DATE 6/10/82

CONCURRENCE

AC: Concur _____ Nonconcur _____ See Tab _____ Date _____

CALJ: Concur _____ Nonconcur _____ See Tab _____ Date _____

Mr. Friedenberg: Concur _____ Nonconcur _____ See Tab _____ Date _____

OPP: Concur _____ Nonconcur _____ See Tab _____ Date _____

OAO: Concur _____ Nonconcur _____ See Tab _____ Date _____

OFA: Concur _____ Nonconcur _____ See Tab _____ Date _____

OSC: Concur _____ Nonconcur _____ See Tab _____ Date _____

for James W. [illegible]
Levi J. Ogden

TAB A - Sample of Feedback Memorandum
TAB B - Sixteen ALJs Presently Under 100 Percent Review
TAB C - Comments from Mr. Friedenberg and OAO

TAB A

SGR1

Chief Administrative
Law Judge

Bellmon Review Feedback Report - ACTION

Regional Chief Administrative
Law Judge
Region: ______

The review of ALJ __________ reversal decisions has uncovered significant problems affecting decisional quality and accuracy. For the quarter ending ________, _______ percent of this ALJ's reversal decisions have been reviewed by the Appeals Council on its own motion. Attached are brief analyses of a select group of these cases, together with a copy of the hearing decision and the Appeals Council's remand order or decision, as appropriate.

It is requested that you schedule an individual counselling session with this ALJ to discuss correction of the problems identified. Please schedule the session as soon as is practicable and advise me by memorandum as to the date you met with the ALJ. I am also interested in your assessment of the likely effects of the counselling.

Our objective is to improve the quality and consistency of the decision making process. Peer counselling is a fundamental part of achieving this goal. Your full and timely cooperation in this matter will be appreciated.

Philip T. Brown

Attachment

Analysis of Bellmon Review Results - ALJ: ___________ ... .

1. Claimant: John Doe - 000-00-0000

In this case, the ALJ did not evaluate the medical evidence in his decision. He merely summarized certain aspects of the evidence and made his conclusion. Pain was an element in his decision, but he neither examined the record for support of his conclusion that pain was severe nor made formal findings on the credibility of testimony. The ALJ allowed this case, finding that the claimant's impairment "meets or equals" the listing. He did not specify a particular listing or indicate whether a listing was met or equalled.

The Appeals Council reviewed this case on its own motion. Despite the absence of a medical assessment of the claimant's ability to do work related activities, the AC concluded that the evidence did establish an RFC for light work. The AC found no basis to support the allegations of severe pain or that pain of a magnitude necessary to impair the claimant was established by the record. It found no substantial evidence to support the ALJ's conclusion that the listings were met or equalled. The AC reversed the ALJ based on Rule 202.17.

2. Claimant: Paul Smith - 111-11-1111 (Deceased)

The ALJ allowed this case on the strength of the decedent's wife's testimony that the decedent's impairment precluded SGA prior to 3/31/77, the date the earnings requirements were last met. He again did not evaluate the medical evidence. Instead, he merely summarized it briefly; but, he did point out that the medical evidence did not disclose a diagnosed impairment until 1979. It should be noted that neither the ALJ's rationale nor his decisional basis of an inability to engage in SGA, strictly conforms to the provisions of the sequential evaluation. The ALJ did not go through the individual steps of disability evaluation. He did not resolve the question of RFC per PPS No. 64; nor did he consider the exertional and mental requirements of the decedent's past relevant work. He also did not consider the vocational rules.

The Appeals Council reviewed this case on its own motion and reversed the decision on the record. The AC found no substantial evidence to support the ALJ's conclusion. The AC found no evidence of a severe impairment on or before the date last met.

3. Claimant: Bill Edwards - 222-222-2222

In this case, the ALJ again allowed on the basis of "meets or equals" the listing. As in case number 1, he did not specify a particular listing or indicate whether the listings were, in fact, met or equalled.

The ALJ's analysis in this case was somewhat better than in the two cases listed above. Specific medical reports were cited by exhibit number, but the ALJ did not analyze the medical findings. The Appeals Council did analyze the findings on own motion and reversed the ALJ. The evidence, including that mentioned by the ALJ in his decision, clearly established an ability to perform light work. The AC reversed under Rule 202.21.

Tab B

	Avg. Number of Reversals Per Month	Number to be Reviewed	Cumulative Own Motion Rate	Own Motion Rate for Dec. & Jan.
ALJ - 100% Review				
	7.8	7.8	11.1	40.0
	24.3	24.3	28.6	37.5
	21.3	21.3	40.7	41.7
	22.5	22.5	20.0	35.0
	3.3	3.3	20.0	33.3
	27.8	27.8	37.1	45.0
	12.3	12.3	23.5	37.5
	20.5	20.5	25.0	62.5
	19.5	19.5	33.3	35.7
	20.5	20.5	26.1	57.1
	35.3	35.3	32.0	37.5
	10.3	10.3	11.1	40.0
	11.3	11.3	41.7	50.0
	16.8	16.8	15.0	43.8
	26.0	26.0	22.7	9.1
	22.0	22.0	20.0	21.1
	301.5	301.5		

REASON FOR CORRECTIVE ACTION

	REASON FOR ACTION	BASIS FOR AC ACTION	ABUSE OF DISCRETION	ERROR OF LAW	NO SUBSTANTIAL EVIDENCE	POLICY OR PROCEDURAL ISSUE
REVERSE	SUBSTANTIAL GAINFUL ACTIVITY					
	NO SEVERE IMPAIRMENT					
	CAN DO PAST RELEVANT WORK					
	RULE					
	FRAMEWORK OF RULE					
REMAND	HEARING NEEDED					
	C/E NEEDED					
	EXISTING EVIDENCE NEEDED					
	VE TESTIMONY NEEDED					
	MA TESTIMONY NEEDED					

DMK -
Files

April 21, 1982

NOTE TO JAY OGDEN

FROM: IRWIN FRIEDENBERG, DIRECTOR,
FIELD TRAINING INITIATIVE STAFF

SUBJECT: Bellmon Review Feedback

I believe your proposal is a good first step in developing a meaningful feedback system for targeted ALJ's under the Bellmon review. However, I question whether the initial group should be limited to the 16 ALJ's subject to 100% review. Under your plan it will be nearly one year before the next level of ALJ's (those under 75% review) would receive counseling. I don't think this is acceptable and suggest you include a greater number of ALJ's in the initial go around.

Irwin Friedenberg

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Adminis

Refer to:

Memorand

Date: JUL 6 1982

From: Associate Commissioner
Office of Hearings and Appeals

Subject: SES Performance Plan

To: Mr. Paul B. Simmons
Deputy Commissioner
Programs and Policy

I am proposing that the standard under the first objective of my performance plan be changed. The standard currently reads:

> "Take vigorous steps to substantially achieve the OMS goal of 40 dispositions per ALJ by the end of FY 82, including hiring additional support staff, obtaining improved word processing and other necessary equipment and improving hearing office efficiency through innovation and realigning work flow and organization."

The OMS goal of 40 dispositions was predicated, in writing, upon obtaining a budget amendment that would allow us to increase the support staff to ALJ ratio to 5 to 1 during this fiscal year. As you know, the budget amendment was not approved. Furthermore, the hiring freeze that was in effect for muc of the year slowed us down in filling the vacancies under the existing budget. Even though we have now added several hundred support staff to the field, we have not been able to increase the support staff ratio because we have hired over 100 ALJs.

The other difficulty in increasing the productivity of ALJs has been the number of external factors over which we have no control. The Pickle bill an the controversy surrounding CDIs have been very distracting to the ALJs and have, in my opinion, diverted a good portion of their energies away from the workload.

In view of the lack of resources to achieve the 5 to 1 support staff ratio this year, and the external factors that were not anticipated when we formulated the OMS goal, I am proposing that the following language be substituted as the standard under the first objective:

> "Increase the number of monthly case dispositions by hiring additional ALJs and support staff, obtaining improved word processing and other necessary equipment and improving hearing office efficiency through innovation and realigning work flow and organiztion."

/s/
Louis B. Hays

DOCUMENT NO. 3 (7 pages)

Approved per PBS

PLAINTIFF'S EXHIBIT 368(C)

EXECUTIVE, MANAGERIAL AND SUPERVISORY

PERFORMANCE PLANNING, REVIEW, AND APPRAISAL SYSTEM

Individual's Name Louis B. Hays

Title Associate Commissioner Organization Office of Hearings and Appeals

Supervisor's Name John A. Svahn/Paul B. Simmons

Performance Period: From 4/1/82 To 9/30/82

PURPOSE:

1. To increase managerial and organizational effectiveness, and
2. Provide the basis for bonuses and meritorious ranks for SES, merit pay for managers and supervisors, and other personn decisions.

COVERAGE:

The system is designed to cover individuals serving in the following positions:

1. Senior Executive Service.
2. Other grades GS-16 and above, and
3. Managers/Supervisors, grades GS-13-15.

CONTENT:

The content of the performance plan, reviews and appraisal comprise the two basic parts of an individual's performance.

1. Individual and organizational results for which the individual is personally accountable.
2. The way or manner in which the individual manages.

RESPONSIBILITIES OF THE SUPERVISOR:

1. Review the individual's job responsibilities and organizational objectives.
2. Establish performance expectations for the coming performance period.
3. Conduct progress reviews with the individual.
4. Appraise the individual's performance and discuss the appraisal with him/her.

RESPONSIBILITIES OF THE INDIVIDUAL:

1. Review own job responsibilities.
2. Assist in the establishing of performance expectations with supervisor.
3. Participate in progress reviews.
4. Participate in the appraisal discussion.

DISPOSITION OF FORM:

This form is subject to the provisions of the Privacy Act. Signed copies are to be retained by the supervisor and individual an copies provided for review and retention, as required, to appropriate management levels having a need to know.

INSTRUCTIONS

PERFORMANCE PLANNING

The following planning steps are to be done by the supervisor in consultation with the individual prior to the performa period. One element of the plan must include EEO. The completed plan must be signed by both persons.

Weight Results vs Manner of Performance

- Determine overall emphasis to be given each.
- Results, Part I, must be weighted 60 to 80 points.
- Manner, Part II, must be weighted 20 to 40 points.
- Total weight must be 100 points.

Set Objectives and Standards in Part I

- Determine results needed and express as objectives.
- At least one objective must be checked as critical.
- Specify the relative priority value of each objective. The separate values must add to the total weight given Part I.
- For each objective, set a standard which describes observable criteria for Level 2, fully met, performance.

Determine Management Areas in Part II

- Determine the areas for which the individual is responsible.
- Specify the relative priority value of each area. The separate values must add to the total weight given Part II. For each not checked, put 0 for the priority value.

PROGRESS REVIEWS

- Formal progress reviews must be held mid-term and during the ninth or tenth month to discuss progress, any problems an modify the plan if warranted.
- Any changes to be made in the plan for the last quarter must be reviewed by a higher-level supervisor.
- The formal reviews must be signed by both the supervisor and the individual.

.PERFORMANCE APPRAISAL

Following the performance period, the supervisor is to appraise the individual's performance in light of the performance and progress reviews of that period. Both persons must sign the appraisal.

Appraise Results of Performance

- Determine the degree to which each objective was met and record the level of performance.
- Summarize the results achieved for each objective.
- Multiply level of performance by priority value to get weighted performance value for each objective

Appraise Manner of Performance

- Determine actual level of performance for each area using the behavioral examples in Appendix C of the Manual.
- Summarize incidents of performance if Unsatisfactory or Outstanding levels of performance occurred.
- Multiply level of performance by priority value to get weighted performance value for each area.

Summarize Total Performance

- Add the weighted performance values of each part to get the total weighted performance score for the part.
- Add the two total part scores to get the total performance score.
- Check the summary appraisal category in which the total performance score falls.

PERFORMANCE PLAN			PROGRESS REVIEWS		PERFORMANCE APPRAISAL		
a) OBJECTIVES List results to be achieved expressed as organizational and/or individual objectives	b) RELATIVE PRIORITY VALUES[1]	c) STANDARDS List observable criteria for determining if objectives are fully met[2]	d) PERIOD 1 Initial and date any changes and comments made	e) PERIOD 2	f) ACTUAL PERFORMANCE Summarize results achieved	g) ACTUAL LEVEL OF PERF.[3]	h) WT'D PERF. (b x g)
Check if critical element ☒ (1) Increase the productivity of administrative law judges (ALJs).	25	Take vigorous steps to substantially achieve the OMS goal of 40 dispositions per ALJ by the end of FY 82, including hiring additional support staff, obtaining improved word processing and other necessary equipment and improving hearing office efficiency through innovation and realigning work flow and organization.					
Check if critical element ☒ (2) Improve the uniformity and quality of ALJ decisions.	30	Take vigorous steps to substantially meet the OMS goals of incorporating the POMS disability adjudicatory standards into Social Security Rulings and reviewing 15 percent of ALJ allowance decisions. Phase out the use of the short form fully favorable decision and improve and increase					
Check if critical element ☐		training for ALJs and support staff. One result of these steps will be some reduction in the ALJ allowance rate.					
Check if critical element ☐ (3) Improve the credibility of the agency in the field.	10	Insure that allegations of impropriety and misconduct are investigated and that appropriate follow-up action is taken. Pursue adverse actions against ALJs who seriously underperform or engage in misconduct. Improve management training for field staff.					

☐ Check if more objectives on additional page(s).

---

[1] Relative priority values must add to total weight in Part I.
[2] Standards must denote criteria for Level 2 performance. Additional standards for an objective are optional.
[3] Levels of performance in meeting objectives: 0 = Failed to meet, 1 = Partially met, 2 = Fully met, 3 = Exceeded, 4 = Substantially exceeded.

PERFORMANCE PLAN			PROGRESS REVIEWS		PERFORMANCE APPRAISAL		
a) OBJECTIVES List results to be achieved expressed as organizational and/or individual objectives	b) RELATIVE PRIORITY VALUES[1]	c) STANDARDS List observable criteria for determining if objectives are fully met[2]	d) PERIOD 1 Initial and date any changes and comments made	e) PERIOD 2	f) ACTUAL PERFORMANCE Summarize results achieved	g) ACTUAL LEVEL OF PERF.[3]	h) WTD PERF. (b x g)
Check if critical element ☐ (4) Provide executive direction and agency leadership.	15	Respond to requests and directives from the Commissioner and Deputy Commissioner promptly and accurately. Provide authoritative, reliable and timely advice and counsel concerning OHA-related matters to superiors. Maintain high productivity and morale at headquarters.					
Check if critical element ☐							
Check if critical element ☐							
Check if critical element ☐							

☐ Check if more objectives on additional page(s).

---

[1] Relative priority values must add to total weight for Part I.
[2] Standards must denote criteria for Level 2 performance. Additional standards for an objective are optional.
[3] Levels of performance in meeting objectives. 0 = Failed to meet, 1 = Partially met, 2 = Fully met, 3 = Exceeded, 4 = Substantially exceeded.

PART II. MANNER OF PERFORMANCE (WT. = 20 20 to 40 Points)

PERFORMANCE PLAN		PROGRESS REVIEWS		PERFORMANCE APPRAISAL	
(a) Management Area[1]	(b) Relative Priority Value[2]	(c) Review Period 1 (✓) If Below Level 2	Review Period 2	(d) Actual Level Performed[3]	(e) Weighted Performanc (b) × (d)
A. Planning and Organizing Work	4				
B. Directing, Controlling and Coordinating Work	3				
C. Managing Personnel	3				
D. Supporting Equal Employment Opportunity	2				
E. Dealing with Outside Groups and the Public	3				
F. Providing Subject Matter Expertise and Leadership	3				
G. Administrative Responsibilities	1				
H. Personal and Inter-Personal Work Habits	1				

Summarize here actual incidents of performance if levels 0 or 4 occurred.

---

[1] See manual for definitions of management areas and behavioral examples of performance levels.
[2] Relative priority values must add to total weight for Part II. Enter 0 if an area is not applicable.
[3] Levels of performance: 0 = Unsatisfactory, 1 = Minimally Satisfactory, 2 = Satisfactory, 3 = Above Average, 4 = Outstanding.

The performance plan (Parts I and II) to be signed here once completed prior to the performance period.

4/9/82
Supervisor's Signature
Date

11/9/
Individual's Signature
Date

Performance on Critical Objective(s) in Part I.

Check if performance was 0 on any critical objective ☐
Check if performance was 1 on any critical objective ☐ Ineligible for Bonus/Merit Pay

Combining Weighted Performance Scores

Part I Weight ________ Points + Part II Weight ________ Points = 100 Points

________ + ________ = ________

Part I Score (Add Col. h, Part I) + Part II Score (Add Col. e, Part II) = Total Performance Score

Summary Appraisal Category

Check the category which includes the total performance score.

		Fully Successful
0 - 99 - ☐ Unsatisfactory		200 - 299 - ☐ Satisfactory
100 - 199 - ☐ Minimally Satisfactory		300 - 360 - ☐ Above Average
		361 - 400 - ☐ Outstanding

Appraisal Discussion

I have appraised the individual's performance, documented the appraisal on this form and discussed it with him or her.

Supervisor's Signature ____________________ Date ________

My supervisor has discussed the appraisal of my performance with me; I have retained a signed copy, and:

I do ______ do not ______ wish to provide a written response

I do ______ do not ______ request a review by a higher level official

Individual's Signature ____________________ Date ________

Reviewer's signature (if necessary) ____________________ Date ________

Performance Review Board (PRB) Review for SES

Comments:

Signature ____________________

Comments:

Signature ____________________

Comments:

Signature ____________________

Recommended Summary Appraisal ________

PRB Chairperson ____________________

Final Summary Appraisal ________

Final Approving Official ____________________

REVISED
SEE P2.

EXECUTIVE, MANAGERIAL AND SUPERVISORY

PERFORMANCE PLANNING, REVIEW, AND APPRAISAL SYSTEM

Individual's Name Louis B. Hays

Title Associate Commissioner Organization Office of Hearings and Appeals

Supervisor's Name John A. Svahn/Paul B. Simmons

Performance Period: From 10/1/82 To 9/30/83

PURPOSE:

1. To increase managerial and organizational effectiveness, and
2. Provide the basis for bonuses and meritorious ranks for SES, merit pay for managers and supervisors, and other personnel decisions.

COVERAGE:

The system is designed to cover individuals serving in the following positions:

1. Senior Executive Service.
2. Other grades GS-16 and above, and
3. Managers/Supervisors, grades GS-13-15.

CONTENT:

The content of the performance plan, reviews and appraisal comprise the two basic parts of an individual's performance.

1. Individual and organizational results for which the individual is personally accountable.
2. The way or manner in which the individual manages.

RESPONSIBILITIES OF THE SUPERVISOR:

1. Review the individual's job responsibilities and organizational objectives.
2. Establish performance expectations for the coming performance period.
3. Conduct progress reviews with the individual.
4. Appraise the individual's performance and discuss the appraisal with him/her.

RESPONSIBILITIES OF THE INDIVIDUAL:

1. Review own job responsibilities.
2. Assist in the establishing of performance expectations with supervisor.
3. Participate in progress reviews.
4. Participate in the appraisal discussion.

DISPOSITION OF FORM:

This form is subject to the provisions of the Privacy Act. Signed copies are to be retained by the supervisor and individual and copies provided for review and retention, as required, to appropriate management levels having a need to know.

TD 6

PLAINTIFF'S
EXHIBIT
368(b)

Note To: Lou Enoff

Subject: Amendment to My SES Performance Plan

I am proposing the following amendments to my SES plan, which is attached:

1. Change the relative priority value of element 3 from 20 to 15
2. Change the relative priority value of element 4 from 10 to 5
3. Add as number 6 the following new non-critical element with a relative priority value of 10:

NEW; 5r.
(4, NO 5th)

> "Provide guidance to the Associate Commissioners for Disability and Family Assistance in a timely and authoritative manner."

If you concur, please indicate your approval below.

Louis B. Hays

Attachment

Approved____________

Disapproved________

Other______________

Dated 6/1/83

PART I. RESULTS OF PERFORMANCE (WT. = 80 60 to 80 Points)

PERFORMANCE PLAN			PROGRESS REVIEWS		PERFORMANCE APPRAISAL		
a) OBJECTIVES List results to be achieved expressed as organizational and/or individual objectives	b) RELATIVE PRIORITY VALUES[1]	c) STANDARDS List observable criteria for determining if objectives are fully met[2]	d) PERIOD 1 Initial and date any changes and comments made	e) PERIOD 2	f) ACTUAL PERFORMANCE Summarize results achieved	g) ACTUAL LEVEL OF PERF.[3]	h) WTD PERF. (b × g)
Check if critical element X (1) Increase the disposition of cases by administrative law judges (ALJs).	20	Increase the monthly case dispositions by maintaining a corps of 800 ALJs and hiring additional support staff (subject to necessary budgetary authority), by improving hearing office efficiency through innovation and realigning work-flow and organization, and by ensuring full and efficient use of staff.				4	80
Check if critical element X (2) Improve the uniformity and quality of ALJ decisions.	20	Continue the effective administration of the Bellmon own-motion review program, and attempt to increase it to 25 percent of ALJ allowance decisions, subject to the ability to increase staffing levels in the Office of Appeals Operations. Monitor and control the Government Representative Project. Complete the refresher training program for all ALJs.				3	60
Check if critical element		One result will be some further reduction in the ALJ allowance rate.					
Check if critical element X (3) Design and plan the disability hearing process.	~~20~~ 15 RM	Prepare for the phased-in implementation of the disability hearing process by October 1, 1983. Take the necessary organizational, policy and procedural steps necessary to meet this deadline.				4	60

☐ Check if more objectives on additional sheet(s)

---

[1] Relative priority values must add to total weight for Part I.

[2] Standards must denote criteria for Level 3 [illegible]

PART I. RESULTS OF PERFORMANCE (WT. = 80 60 to 80 Points)

PERFORMANCE PLAN			PROGRESS REVIEWS		PERFORMANCE APPRAISAL		
a) OBJECTIVES List results to be achieved expressed as organizational and/or individual objectives	b) RELATIVE PRIORITY VALUES[1]	c) STANDARDS List observable criteria for determining if objectives are fully met[2]	d) PERIOD 1 Initial and date any changes and comments made	e) PERIOD 2	f) ACTUAL PERFORMANCE Summarize results achieved	g) ACTUAL LEVEL OF PERF.[3]	h) WT'D PERF. (b × g)
Check if critical element ☐ (4) Improve the credibility of the agency in the field.	~~[illegible]~~5	RM Insure that allegations of impropriety and misconduct are investigated and that appropriate follow-up action is taken. Pursue adverse actions against ALJs who seriously underperform or engage in misconduct.				4	20
Check if critical element ☐ (5) Provide executive direction and agency leadership.	10	Respond to requests and directives from the Commissioner and Deputy Commissioner promptly and accurately. Provide authoritative, reliable and timely advice and counsel concerning OHA-related matters to superiors. Maintain high productivity and morale at headquarters.				4	40
Check if critical element ☐ (6) Provide guidance to the Associate Comms. for Disability & Family Assistance in a timely & authoritative manner RM	10	RM				4	40
Check if critical element ☐							

☐ Check if more objectives on additional page(s).

---

[1] Relative priority values must add to total weight for Part I.

[2] Standards must denote criteria for Level 2 performance. Additional standards for an objective are optional.

[3] Levels of performance in meeting objectives: 0 = Failed to meet, 1 = Partially met, 2 = Fully met, 3 = Exceeded, 4 = Substantially exceeded.

S. Gaines [illegible]
To include [illegible]

February 18, 1983

Note To: Don Fay

Subject: SES Performance Plan

In response to the comments of the Performance Review Board on my performance plan, I am making the following revisions in the standards for elements number 1 and 3:

(1) Original Standard

Increase the monthly case dispositions by maintaining a corps of 800 ALJs and hiring additional support staff (subject to necessary budgetary authority), by improving hearing office efficiency through innovation and realigning workflow and organization, and by ensuring full and efficient use of staff.

Revised Standard

Attempt to increase the monthly case dispositions to a level which begins reducing the pending caseload by the end of FY 1983, in spite of potential for major effect on ALJ productivity from ALJ lawsuit and OPM classification review of ALJs. The increases in dispositions may be achieved by maintaining a corps of 800 ALJs and hiring additional support staff (subject to necessary budgetary authority), by improving hearing office efficiency through innovation and realigning workflow and organization, and by attempting full and efficient use of staff.

(3) Original Standard

Prepare for the phased-in implementation of the disability hearing process by October 1, 1983. Take the necessary organizational, policy and procedural steps necessary to meet this deadline.

Revised Standard

Develop a plan for the phased-in implementation of the disability hearings process beginning by October 1, 1983. Take the necessary organizational, policy and procedural steps necessary to meet this deadline.

Louis B. Hays

To S. Gaines [illegible]

cc:

DEPARTMENT OF HEALTH & HUMAN SERVICES

Refer to: SMHL

Memorandum

Date: JAN 28 1983

From: Fred Schutzman
Chairman, SSA Performance Review Board

Subject: Review of SES Performance Plans, FY 1983--ACTION

To: Mr. Louis D. Hays

REPLY REQUESTED BY FEBRUARY 25, 1983

The SSA Performance Review Board (PRB) met on January 17 and 18 and reviewed the performance plans for SES members for FY 1983. The review included plans for the SES members shown on the attached sheet(s).

You may know that, under a recent HHS instruction, the role of the PRB has been strengthened in regard to its review of performance plans. The new policy provides that the PRB may require amendments to original plans, rather than recommending them as in previous years.

Based on our review, we are identifying specific elements that are to be revised. These revisions should be sent to Don Fay, 4200 Annex Building, by February 25, 1983. Don and his staff may be reached on extension 47813; FTS 934-7813.

I have asked Don's staff to make any necessary follow-up contacts with you directly. Thanks for your cooperation.

Fred Schutzman

Attachment(s)

Bob - Could you propose some language to satisfy the PRB's comments? Brenda should have a copy of my plan.

SSA PRB COMMENTS ON SES PERFORMANCE PLANS FOR FY 1983

TO: Lou Hays

Your own plan:

1. Standard needs to contain specific numbers; e.g., increase monthly case dispositions: by how many?

3. Standard could be improved by rephrasing such as "Develops a plan for the phased-in implementation of the disability hearing process by 10-1-83."

PART II. MANNER OF PERFORMANCE (WT. = 20 20 to 40 Points)

PERFORMANCE PLAN		PROGRESS REVIEWS		PERFORMANCE APPRAISAL	
(a) Management Area[1]	(b) Relative Priority Value[2]	(c) Review Period 1 (✓) If Below Level 2	Review Period 2	(d) Actual Level Performed[3]	(e) Weighted Performance (b) x (d)
A. Planning and Organizing Work	4			4	16
B. Directing, Controlling and Coordinating Work	3			4	12
C. Managing Personnel	3			4	12
D. Supporting Equal Employment Opportunity	2			3	6
E. Dealing with Outside Groups and the Public	3			4	12
F. Providing Subject Matter Expertise and Leadership	3			4	12
G. Administrative Responsibilities	1			3	3
H. Personal and Inter-Personal Work Habits	1			4	4

Summarize here actual incidents of performance if levels 0 or 4 occurred.

---

[1] See manual for definitions of management areas and behavioral examples of performance levels.

[2] Relative priority values must add to total weight for Part II. Enter 0 if an area is not applicable.

[3] Levels of performance: 0 = Unsatisfactory, 1 = Minimally Satisfactory, 2 = Satisfactory, 3 = Above Average, 4 = Outstanding.

The performance plan (Parts I and II) to be signed here once completed prior to the performance period.

Paul B 12/14/82 12/14

[illegible] Signature Date Individual's Signature Date formance on Critical Objective(s) in Part I.

Check if performance was 0 on any critical objective ☐
Check if performance was 1 on any critical objective ☐ Ineligible for Bonus/Merit Pay

Combining Weighted Performance Scores

Part I Weight 80 Points + Part II Weight 20 Points = 100 Points

300 Part I Score (Add Col. h, Part I) + 77 Part II Score (Add Col. e, Part II) = 377 Total Performance Score

Summary Appraisal Category

Check the category which includes the total performance score.

0 - 99 - ☐ Unsatisfactory
100 - 199 - ☐ Minimally Satisfactory

Fully Successful
200 - 299 - ☐ Satisfactory
300 - 360 - ☐ Above Average
361 - 400 - ☒ Outstanding

Appraisal Discussion

I have appraised the individual's performance, documented the appraisal on this form and discussed it with him or her.

Supervisor's Signature Louis D. Enoff Date 10-25-83

My supervisor has discussed the appraisal of my performance with me; I have retained a signed copy, and:

I do ______ do not ✓ wish to provide a written response
I do ______ do not ✓ request a review by a higher level official

Individual's Signature ______ Date 10/25/83

Reviewer's signature (if necessary) ______ Date ______

Performance Review Board (PRB) Review for SES

Comments:

Signature

Comments:

Signature

Comments:

Signature

Recommended Summary Appraisal O

PRB Chairperson

Final Summary Appraisal O Martha A. McSteen
Final Approving Official

DEPARTMENT OF HEALTH & HUMAN SERVICES

Refer to: SCFU

Memorandum

Date: FEB 1 1982

From: Director, Office of Appraisal

Subject: Criteria for Modifying the Population for the Targeted Ongoing Review -- DECISION

To: Mr. Louis B. Hays
Associate Commissioner
Office of Hearings and Appeals
Through: ES

ISSUE

To develop procedures for expansion of the targeted group for the 15 percent Bellmon review, removal of ALJs and hearing offices from the targeted review, and replacement of those ALJs and hearing offices removed.

FACTS

The program of own motion review which began on October 1, 1981, concentrates on title II disability and concurrent title II and XVI disability reversals issued by ALJs. For purposes of the review, ALJs are ranked by reversal rates both individually and by hearing office. The reversal rate rankings were based upon production data for the period October 1980 to March 1981, inclusive. Those ALJs and hearing offices with the highest reversal rates were targeted for the review.

Central Office resources were analyzed prior to the selection of the ALJs and hearing offices for review. It was determined that 20 hearings and appeals analysts could be freed from their regular activities to perform the review and that about 9,000 cases could be reviewed annually. It was also decided that only 50 percent of each targeted ALJ and hearing office's reversals would be reviewed in order to permit the inclusion of more ALJs and hearing offices in the program.

A 50 percent review totalling 9,000 cases translated into a reversal rate cutoff of 70 percent and above for hearing offices and 74 percent and above for individual ALJs. Cases from the seven hearing offices and 34 ALJs that met these criteria are presently reviewed.

The targeted ALJs and hearing offices send all reversal decisions to Central Office, where a 50 percent sample is selected by OA. The sample cases are then referred to OAO analysts who perform a pre-effectuation review. Those cases in which there appears to be an abuse of discretion by the ALJ, or an error of law, or in which the decision does not appear to be supported by substantial evidence, or there is a broad policy or procedural issue that may affect the general public interest, are referred to the Appeals Council. If the Appeals Council agrees that the hearing decision is defective, it exercises its own motion authority for appropriate corrective action.

Beginning in April 1982, the ongoing program will be expanded to review 15 percent of title II disability and concurrent title II and XVI disability reversal decisions. The number of targeted ALJs and hearing offices will be increased to meet this higher percentage. The size of this increase is dependent upon the Associate Commissioner's decision as to whether a 25 percent (or smaller) random sample of reversals should be included in the 15 percent review. Also, it is anticipated that improvements in performance will result from the ongoing review, so that some ALJs/HOs will be dropped and others added. With these factors in mind, we have developed specific proposals for expanding and modifying the targeted review population.

DISCUSSION

The Bellmon own motion review is a multifaceted program to correct ALJ reversals and, in the process, promote behavioral change. By behavioral change we mean to correct those aspects of decisional performance which do not reflect the content of the law, regulations or SSA policy. To accomplish this, several different approaches must be considered. The case review aspect is only one part the process.

The case review provides data on an individual ALJ's action in a particular case. Appeals Council remand orders and reversal decisions show ALJs why these cases are defective in the context of the facts presented and how the defects should be corrected. The more intractable problems might need to be addressed by special memoranda from the CALJ, AC visits, special training, or a combination of these methods.

The targeting of an ALJ for ongoing review is the beginning of the process by which we expect to influence individual decisional behavior and attitudes. If an ALJ's work is improving during the review, we can examine a steadily declining proportion of his or her cases and redirect resources elsewhere. Removing an ALJ from review is the end result of the total Bellmon process.

Selection of ALJs and Hearing Offices for Case Review

The first matter which requires attention is the expansion of the targeted population to the appropriate level under a 15 percent review. To accomplish this, we propose using a methodology similar to that which was developed to select the initial group of ALJs and hearing offices. ALJs and hearing offices with reversal rates above a certain level will be targeted for the Bellmon review.

In determining the number of targeted title II and title II/XVI concurrent disability reversals that will be forwarded to CO at the 15 percent level of review, we assume that three-quarters of the Bellmon review will be comprised of targeted cases and that, in line with current procedures, 50 percent of the cases retrieved will be sampled and reviewed. Using FY82 receipts projections, annually this would require that about 34,924 reversals be obtained and that 17,462 reversals be reviewed. Based upon FY81 reversal rate information this would translate into a reversal rate cutoff of 70.1 percent, which would include the work of 71 ALJs and nine hearing offices. (Within 30 days from the scheduled beginning date of the expanded review, the reversal rate cutoff levels would have to be refigured using more current data.)

After the targeted review is expanded a similar procedure will be employed to replace ALJs and hearings offices removed from review. As they are removed, the reversal rate criterion will be used as a guideline for selecting other ALJs and hearing offices to be reviewed. While reversal rates will continue to be the objective criterion for adding ALJs and hearing offices, some measure of flexibility is thought necessary to preserve the review as a rational and reasoned program.

Thus, the decision to add will be made by the CALJ based upon a memorandum initiated by OA that will include recommendations and comments from OAO and OFA. This is one way we can insure that an ALJ or hearing office which had been removed from review but which retains a high reversal rate will not immediately be returned to the review. Attached at Tab A are samples of the memoranda to be prepared by OA proposing that an ALJ or hearing office be added to the review.

The above discusses adding ALJs and hearing offices to the targeted review. But it could also apply if ALJs only are added to the review and hearing offices are removed. Those ALJs with high reversal rates within a previously targeted hearing office would be added, individually, to the review.

OPTIONS

Option 1: ALJs and hearing offices are added to the targeted review based upon reversal rates.

Pros

- o Including hearing offices with ALJs in the expanded target review is consistent with existing practice.
- o Using reversal rates to identify ALJs and hearing offices for the enlarged targeted review, and to replace those ALJs and hearing offices removed for performance reasons, is also consistent with existing practice.

Cons

- o Once a hearing office is targeted, removal may prove difficult if even one ALJ's performance exceeds the guidelines for removal discussed later in this paper.

Option 2: ALJs only will be targeted based upon reversal rates. Those hearing offices presently on review will be removed.

Pros

- o This approach would make more effective use of OHA resources.
- o The removal process will be simplified.

Con

None

RECOMMENDATION

We recommend the adoption of Option 2 since OHA resources would be more effectively utilized if, when targeting for the expanded review, only decisions from high reversing ALJs are examined.

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MEMO . . . "Criteria for Modifying the Population for the Targeted Ongoing
Review — DECISION"

DECISIONS

1. ALJs and hearing offices are added to the targeted review based upon reversal rates.

APPROVE____________
DISAPPROVE RSH
OTHER____________
DATE 2/26

CONCURRENCE

OAO:	Concur ______	Nonconcur ______ See Tab ____	Date ______
OPP:	Concur ______	Nonconcur ______ See Tab ____	Date ______
OFA:	Concur ______	Nonconcur ______ See Tab ____	Date ______
AC:	Concur ______	Nonconcur ______ See Tab ____	Date ______
CALJ:	Concur ______	Nonconcur ______ See Tab ____	Date ______

2. ALJs only will be targeted based upon reversal rates. Those hearing offices presently on review will be removed.

APPROVE RSH
DISAPPROVE____________
OTHER____________
DATE 2/26

In addition, please remember that I want the flexibility of using some portion of our total Bellmon review capacity for cases other than the random sample and the targetted sample. For example, we may have more ODO-refer cases, Regional Commissioner cases, 100% review new ALJ cases and special situations warranting [illegible]

CONCURRENCE

OAO:	Concur ______	Nonconcur ________ See Tab _____	Date ________
OPP:	Concur ______	Nonconcur ________ See Tab _____	Date ________
OFA:	Concur ______	Nonconcur ________ See Tab _____	Date ________
AC:	Concur ______	Nonconcur ________ See Tab _____	Date ________
CALJ:	Concur ______	Nonconcur ________ See Tab _____	Date ________

Removal of ALJs and Hearing Offices from Case Review

The following options describe two alternative guides for removing ALJs and hearing offices from review. The final decision to remove an ALJ or hearing office from review will be made by the CALJ. OA will initiate the recommendations to remove and will seek OAO and OFA comments. Attached at Tab B are samples of the memoranda to be prepared by OA.

At this point in time, we expect to evaluate individual ALJ and hearing office performance under the review and make recommendations quarterly. A sufficient number of cases should be reviewed within this time. But at least 20 cases must be reviewed before we will consider making a recommendation to the CALJ.

OPTIONS

Option I: The rate at which the Appeals Council has taken own motion review of cases issued by the targeted group compared to an "selected" own motion rate will serve as a guide to recommending removal.

"Selected" own motion rates will be figured semi-annually. They will be set by a consensus reached among OA, OAO, OPP, OFA and the CALJ. We would expect that one rate will be used for ALJs and another for hearing offices, if they remain a part of the targeted review. At this point in time we favor "selected" own motion rates of five percent for ALJs and 10 percent for hearing offices.

Once the "selected" rates are set, they will be compared against the actual own motion rates for the targeted group. We will initiate the recommendation to remove when an ALJ's or hearing office's own motion rate is equal to or less than the "selected" rates.

Pros

- o This is an uncomplicated method for identifying ALJs and hearing offices for possible removal from review.
- o Establishing "selected" own motion rates would provide us with goals in assessing performance under the review.
- o "Selected" own motion rates, if communicated to ALJs, would put them on notice of our expectations.

Cons

- o It may be difficult to arrive at a consensus view of what the "selected" rates should be.
- o The concept of a "selected" own motion rate could be controversial since it would be essentially arbitrary.
- o It would be difficult to defend any "selected" own motion rate if challenged.
- o Establishing a "selected" rate that is too low could slow down or render impossible the removal of ALJs and hearing offices from review.

Option 2: The rate at which the Appeals Council has taken own motion review of cases issued by the targeted group compared to a "standard" own motion rate will serve as a guide to recommending removal.

"Standard" own motion rates will be figured quarterly. The rates will be established based upon the results of the pre-effectuation review of the random sample portion of the 15 percent review. The own motion rate for the random sampled ALJs will be the "standard" rate used to determine whether a recommendation for removal is warranted.

Pros

- This is an uncomplicated method for identifying ALJs for possible removal from review.
- Basing removal on a "standard" rate derived from the actual review of ALJs should diffuse potential controversy.
- The "standard" rate would not be arbitrary.
- This method would effectively match ALJs against their peers, thereby providing an accurate means of evaluating ALJ progress while under review.

Cons

- The "standard" rate would likely fluctuate when computed so it would not remain constant.
- The "standard" rate is based upon the own motion rates of individual ALJs and would not be representative of hearing office own motion rates.

RECOMMENDATION

We recommend the adoption of Option 2 since the "standard" rate would effectively compare the performance of targeted ALJs against a statistically reliable measure of national ALJ performance.

DECISIONS

1. The rate at which the Appeals Council has taken own motion review of cases issued by the targeted group compared to a "selected" own motion rate will serve as a guide to recommending removal.

APPROVE ____________

DISAPPROVE ____________

OTHER *

DATE 2/26

* I believe we need more consideration of this issue. We also need to consider the issue of reviewing more than 50% of some ALJ's decisions and less than 50% of other ALJs decisions. We need more thought about the time periods involved - i.e., how long is a representative period of time - months, 6 months, or what. I'm also not sure how mechanical this process can be. There may have to be some judgment place about the quality of the decisions in addition to a mathematical

Page 9
MEMO . . . "Criteria for Modifying the Population for the Targeted Ongoing Review -- DECISION"

CONCURRENCE

OAO: Concur _____ Nonconcur _____ Date _____
See Tab _____

OPP: Concur _____ Nonconcur _____ Date _____
See Tab _____

OFA: Concur _____ Nonconcur _____ Date _____
See Tab _____

AC: Concur _____ Nonconcur _____ Date _____
See Tab _____

CALJ: Concur _____ Nonconcur _____ Date _____
See Tab _____

2. The rate at which the Appeals Council has taken own motion review of cases issued by the targeted group compared to a "standard" own motion rate will serve as a guide to recommending removal.

APPROVE_____
DISAPPROVE_____
OTHER [illegible] - see #1
DATE_____

CONCURRENCE

OAO: Concur X [illegible] Nonconcur _____ Date _____
See Tab X

OPP: Concur X Nonconcur _____ Date _____
See Tab _____

OFA: Concur X Nonconcur _____ Date _____
See Tab _____

AC: Concur _____ Nonconcur _____ Date _____
NO COMMENT
See Tab _____

CALJ: Concur _____ Nonconcur _____ Date _____
See Tab _____

Levi J. Ogden

Attachments:

TAB A - Proposed Memoranda to CALJ Recommending Adding ALJ/HO to the Ongoing Review

TAB B - Proposed Memoranda to CALJ Recommending Removing ALJ/HO from the Ongoing Review

Testimony of Victor G. Rosenblum Before the Subcommittee on Oversight Management Committee on Governmental Affairs. U. S. Senate, June 6, 1983.

Mr. Chairman and members of the Committee, my name is Victor G. Rosenblum. I've been a professor at North-Western University since 1958 and am a past chairman of the Administrative Law Section of the American Bar Association and a current vice president of the American Judicature Society. Although my testimony before you is not likely to be incompatible with positions of the ABA and AJS, I should make it clear that I am testifying today in behalf of no one but myself. My views on administrative law judges have developed in the course of studying and teaching about the administrative process for some twenty five years.

Though my experience is predominantly academic, I hope that such ties as having been a staff counsel with the House of Representatives Committee on Government Operations, service as a member of the then Civil Service Commission's Advisory Committee on Administrative Law Judges, service as a member of the advisory committee to the National Institute on Law Enforcement and Criminal Justice, and consulting work with and current membership on the Administrative Conference of the United States have provided ties with the "real" world that will keep my testimoney from being purely academic.

I would like to focus on issues affecting appointment, tenure and roles of Administrative Law Judges. I believe that any plan, policy or program that re-introduces political influence over the decision of Administrative Law Judges embodies an idea whose time has long since passed. One of the great strengths of our governmental system is our capacity to direct and confine political controls to those areas and institutions that can be nurtured and enhanced through them. The legislative branch of our government offers a prime illustration of constructive political controls. At the same time, the Judicial branch of our government has acquired its stature because it is recognized and accepted that politics can play no part in the decisions of our Federal judges.

That the administrative process is a hybrid of legislative, executive and judicial roles in its totality has never meant that there are not particular functions within the agencies that cannot be identified as legislative, executive, or judicial. The Administrative Law Judge performs a judicial function that parallels within the administrative process the roles of our other Federal judges within the broader governmental process. That judicial office has been and must continue to be free from political pressures and influences. Reinstitution of politics as a means for controlling adjudication would constitute repudiation and degradation of the bonafide reforms of recent decades.

Congress asserted the importance of the principle that adjudication should not be subject to politicization when it adopted the Administrative Procedure Act in 1946 especially Section 11 of the Act dealing with hearing examiners. The language of § 3105, § 7521 and § 5362 could not have been clearer or more forthright in this respect: "Hearing examiners shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as hearing examiners. A hearing examiner appointed under Section 3105 of this title may be removed by the agency in which he is employed only for good cause established and determined by the Civil Service Commission on the record after opportunity for hearing. Hearing examiners appointed under Section 3105 of this title are entitled to pay prescribed by the Civil Service Commission independently of agency recommendations or ratings...."

By making salaries independent of the employing agency's recommendations or ratings, and especially by appointing hearing examiners for life with removal only for good cause as determined by the Commission -- now by the Merit Systems Protection Board, Congress established standards for dealing with ALJs that veered from those for dealing with many other agency employees; but Congress felt these exceptions and changes were necessary to insure impartiality.

The American Bar Association launched a vigorous campaign in 1947 to watchdog the Commission's work and insure the success of the new system under the APA. "Of personal and professional interest to many lawyers are the steps taken to implement the provisions of the Administrative Procedure Act to secure impartiality, qualifications, and independence and security of tenure, on the part of the Hearing Examiners for the agencies." (ABA Journal 33:1, Jan. 1947).

The ABA hoped that the final selection "will be of men who are free from bias, ideological preconceptions, partisan fealty, subservience to 'pressure groups', habits of unfairness, disregard of the true values and weight of evidence." (ABA Journal 33:213, March, 1947).

On Capitol Hill, the chairman of the Senate Committee on the Judiciary, Senator Wiley of Wisconsin, insisted also that appointments be non-partisan, with choices based on fitness rather than on "a narrow partisan and ideological basis, with the selection largely limited to present examiners and agency staffs, with all members of other parties largely excluded, irrespective of their possibly superior qualifications." (ABA Journal 33:422-423, May, 1947).

An excellent overview of Congress's intentions for hearing examiners under the APA was given at the time by Professor Morgan Thomas of the University of Michigan, in an article on "The Selection of Federal Hearing Examiners: Pressure Groups and the Administrative Process" published in 1950 in the Yale Law Journal (59:431-75). Professor Thomas noted that:

> Integral to the new procedure was the creation within each agency of a special corps of hearing examiners independent of agency control or influence.... The main change lay in the new independence which hearing examiners were to have. To that end they were explicitly made free of supervision by the investigatory, prosecuting, and administrative staffs of their agencies.... Within each agency, cases were generally to be rotated so that agency influence could not be made effective through assignment of cases. Moreover, the Civil Service Commission was entrusted with the broad powers which agencies themselves had previously exercised over their trial examiners. Thus the Commission was given authority to prescribe examiners' grades and salaries and to pass on promotions independently of agency ratings or recommendations. An examiner could be removed only if "good cause" were established at a Civil Service Commission hearing.

The Report of the Committee on the Judiciary (Report of the Senate Committee on the Judiciary on Sen. Rep. No. 752, 79th Congr., 1st Sess. [1945], reprinted in Sen. Doc. No. 248, 79th Cong. 2d. Sess. 215 [1946]) explained concisely the reasons for these provisions of Section 11:

> "The purpose of this section is to render examiners independent and secure in their tenure and compensation. The section thus takes a different ground than the present situation in which examiners are mere employees of an agency... Recognizing that the entire tradition of the Civil Service Commission is directed toward security of tenure, it seems wise to put that tradition to use in the present case."

It's interesting to note that Congress had been presented with and rejected other proposals for dealing with hearing examiners. One of these proposals included specific terms of office for examiners. Under a plan proposed by the Attorney General's Committee on Administrative Procedure, the hearing examiner would have held office for seven years and then would have to be renominated by the agency and reapproved by the Office of Federal Administrative Procedure. (Final Report of the

Attorney General's Committee on Administrative Procedure, Senate Document No. 8, 77th Congress, 1st Session, 1941, p. 46-7)

Professor Thomas explained that in rejecting proposals like this, a concept that was predominant in congressional thinking was "that the guarantee of security of tenure by the Civil Service commission was the appropriate way to ensure that the examiners would be free from subservience to their agencies."

As Justice White pointed out in the Supreme Court's decision Butz v. Economou, 438 U.S. 478, 1978, at 511-13 "judges have absolute immunity not because of their particular location within the government but because of the special nature of their responsibilities.... We think that adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such administrative adjudication should also be immune from suits for damages.... There can be little doubt that the role of the modern Federal Hearing Examiner or Administrative Law Judge within this framework is 'functionally comparable' to that of a judge."

Although the Butz case focused on the issue of immunity from suits for damages, Justice White's opinion stressed the independence and integrity of Administrative

Law Judges' decision as justification for immunity:

> "More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency. Prior to the Administrative Procedure Act, there was considerable concern that persons hearing administrative cases at the trial level could not exercise independent judgment because they were required to perform prosecutorial and investigative functions as well as their judicial work .... and because they were often subordinate to executive officials within the agency.... Since the securing of fair and competent hearing personnel was viewed as "the heart of formal administrative adjudication", ...the Administrative Procedure Act contains a number of provisions designed to guarantee the independence of hearing examiners. They may not perform duties inconsistent with their duties as hearing examiners... When conducting a hearing under § 5 of the APA, a hearing examiner is not responsible to or subject to the supervision

> or direction of employees or agents engaged in the performance of investigative or prosecution functions for the agency.... Nor may a hearing examiner consult any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate... Hearing examiners must be assigned to cases in rotation so far as is practicable.... They may be removed only for good cause established and determined by the Civil Service Comission after a hearing on the record.... Their pay is also controlled by the Civil Service Commission.
>
> In light of these safeguards, we think that the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women."

Although no sitting federal judge would be likely to testify before you about how he or she would react to political invasion or ALJs' independence of judgment, it would be reasonable to predict that judicial review would have to take on stricter, lengthier and more detailed standards of scrutiny. If a reviewing court can't have the kind of trust Justice White expressed in the integrity and independence of today's ALJs, it would have to probe more deeply and extensively in order to be satisfied with the fairness and substantiality of the record before it. In short, in addition to adverse impacts on recruitment and morale, intrusions upon ALJ decisional independence could also spur a return to suspicion and hostility in court-agency relations that were hallmarks of the early 1930's.

I urge the distinguished members of this Subcommittee to preserve and protect the gains made in our administrative system by the function of fair, impartial and nonpolitical Administrative Law Judges. Subjecting these judicial officials to political controls in the 1980's would unfortunately say to the nation that "nothing recedes like success." We can improve decision making mechanisms through enhancement of knowledge and decisional integrity; we can only corrode or destroy them by subjecting Administrative Law Judges' decisional independence to political controls.

Testimony of Victor G. Rosenblum Before the Subcommittee on Administrative Practice and Procedure Committee on Judiciary U. S. Senate, September 20, 1983.

Mr. Chairman and members of the Committee, my name is Victor G. Rosenblum. I've been a professor at Northwestern University since 1958, am visiting at Washington & Lee University Law School until December as their Frances Lewis Scholar in Residence, am a past chairman of the Administrative Law Section of the American Bar Association and a current vice president of the American Judicature Society. Although my testimony before you is not likely to be incompatible with positions of the ABA and AJS, I should make it clear that I am testifying today in behalf of no one but myself. My views on administrative law judges have developed in the course of studying and teaching about the administrative process for some twenty five years.

Though my experience is predominantly academic, I've had at least some ties with the "real" world beyond academe's ivory towers, such as having been a staff counsel with the House of Representatives Committee on Government Operations, service as a member of the then Civil Service Commission's Advisory Committee on Administrative Law Judges, service on the advisory committee to the National Institute on Law Enforcement and Criminal Justice, and consulting work with and current membership on the Administrative Conference of the United States.

DOCUMENT NO. 6 (14 pages)

I would like to focus today on issues affecting the advisability of establishing an Administrative Law Judge Corps. That the administrative process is a hybrid of legislative, executive and judicial roles in its totality has never meant that there are not particular functions within the agencies that cannot be identified as legislative, executive, or judicial. Administrative Law Judges perform judicial functions that parallel within the administrative process the roles of our other Federal judges within the broader governmental process. The office of Administrative Law Judge has been, since adoption of the Administrative Procedure Act, and must continue to be, independent, impartial and free from political pressures and influences.

Congress asserted the importance of the principle that adjudication should not be subject to politicization when it adopted the Administrative Procedure Act in 1946 especially Section 11 of the Act dealing with hearing examiners. The language of § 3105, § 7521 and § 5326 could not have been clearer or more forthright in this respect: "Hearing examiners shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as hearing examiners.... A hearing examiner appointed under Section 3105 of this title may be removed by the agency in which he is employed only for good cause established and determined by the Civil Service Commission on the record after opportunity for hearing.... Hearing examiners appointed under Section 3105 of this title are entitled to pay prescribed by the Civil Service Commission independently of agency recommendations or ratings...."

By making salaries independent of the employing agency's recommendations or ratings, and especially by appointing hearing examiners for life with removal only for good cause as determined by the Commission -- now by the Merit Systems Protection Board -- Congress established standards for dealing with ALJs that veered from those for dealing with many other agency employees; but Congress believed these exceptions and changes were necessary to assure decisional integrity and fairness.

In a study I did for the Administrative Conference in 1975,[1] I recommended that the time was not then ripe for creation of an ALJ Corps. I'm convinced that now is the hour for such a Corps. Portions of my rationale in 1975 may be worth citing in explanation of why I favor creation of a Corps today:

> I don't believe that establishment of a new independent agency for ALJs should be a priority at this time. Four interrelated factors account for my position: (1) In the three decades since adoption of the APA, the integrity of the ALJ program as administered by CSC has been significantly strengthened. Despite the ravages of Watergate in portions of the Executive branch, there were no indicators of invasion or impairment of the ALJ program by political corruption or other improper influences. (2) The compromise worked out with CSC

prior to the Administrative Conference's vote on location of the hearing examiner program in 1962 has on the whole been effective in providing special attention and competent direction for the ALJ program by the Commission. (3) The idea of an Independent Office offers no panacea for problems of administration, as California's experience with its separate Office of Administrative Procedure shows. (4) CSC has developed a potentially comprehensive and systematic instrument for empirical research into and evaluation of the ALJ program's strengths and weaknesses through the La Macchia Committee study.

Factor (1) is a matter of historical record, and my evaluation of it has not changed between 1975 and today. One would have to make significant changes in evaluation of factors (2), (3), and (4) between 1975 and 1983, however; and those changes lead me to advocate removal of OPM responsibility for the ALJ program and creation of the Administrative Law Judge Corps pursuant to S.1275.

Factor (2) referred to the 1962 "compromise" accounting for the Administrative Conference's vote at that time to recommend retention of the hearing examiner program by the Civil Service Commission. To the best of my knowledge, the "compromise" came after Professor Wilbur Lester, then staff director of the Conference's Committee on Personnel had prepared a detailed critique of CSC's operation of the program, concluding that "from 1947 until 1962 the Civil Service Commission had sufficient time to demonstrate that it could handle the program. It demonstrated that it could not."[2] Lester believed that the creative imagination and constructive effort essential to this important professional program could come only from a new agency rather than from the one that had shown itself "neither ready, nor willing, nor able" in the past.[3]

The Administrative Conference's Committee on Personnel openly acknowledged its dilemma over whether to follow Lester's Report. It reaffirmed that dissatisfaction was widespread over the past performance of the Commission but asserted at the same time that CSC has staff resources in personnel administration which cannot be matched in quality or quantity by a separate personnel office. In addition, the Committee expressed the fear that removing the hearing examiner program from CSC jurisdiction might leave it "an orphan unit in the executive branch and in the congressional committees."[4]

The Civil Service Commission's willingness to admit past inadequacy and to promise future improvement established the context for what became recommendation 28-7 of the Administrative Conference of 1962:

> It is recommended that (a) The hearing examiner program continue to be administered by the Civil Service Commission under the following commitments made by the Commission: the program be administered by a separate office or

combined with the administration of a legal career service; that there be an advisory committee composed predominantly of lawyers of distinction; and that the evaluation of candidates for a hearing examiner register of eligibles include a written and an oral competitive examination. (b) Any successor organization to the Conference have as a part of its normal functions the continuous observation and periodic study of the policies and administration of the hearing examiner program.[5]

The period of constructive implementation of the Conference's 1962 recommendation--exemplified by such promising steps as utilization of a comprehensive written examination, involvement of renowned practitioners and members of the academic community in the oral phase of the examination, addition of trial experience as one basis for qualification for appointment, and establishment of the La Macchia Committee to study multiple dimensions of the status and utilization of administrative law judges--has long since lapsed into limbo. The change in agency title in 1979 from Civil Service Commission to Office of Personnel Management and the division of functions between OPM and the Merit Systems Protection Board wrought no concomitant renewal of reformist energy or zeal. The appointment in 1981 of a distinguished Administrative Law Judge to direct OPM's Office of Administrative Law Judges momentarily heightened optimism that creative leadership and policy guidance might yet spring from the agency; but it was followed by OPM disinterest in, if not hostility to, Judge Morse's plans for extensive research and modest experimentation. The agency's summary revocation of the Director's parking place was just one indicator of its truncated enthusiasm for the Office of Administrative Law Judges' responsibilities, and Director Morse soon thereafter chose to return to active service as an agency ALJ. General Accounting Office studies of management of the administrative law process offer no reason to believe that OPM has made a salient priority the implementation or evaluation of proposals for improving roles, functions and performance of ALJs. On the contrary, GAO has been overtly critical of management of the administrative law process.[6]

The third factor I cited in the 1975 study for putting the concept of a new independent agency for ALJs on "hold" was that state experiences such as California's with such agencies could not yet substantiate claims of improvement or reform in any major sense. I noted for example that the presiding official in California's Office over a fourteen year period had pointed out that "one of the problems in separating hearing officers from the agencies for which they hear cases is that the hearing officer tends to become merely a name without a face."[7] If the persons who preside over hearings are individually known to the agencies and the agencies have a better understanding of who the hearing officers are and what they do, he said, then those agencies "are more apt to adopt the proposed decisions of the hearing officers." A major difficulty with an Independent Office, he continued, is that it has caused "an atmosphere of antagonism" between agencies and the Office.[8] Although analogies between a state agency with 21 hearing officers and a total of 63 employees at that time and a federal agency which would encompass more than 1000 ALJs cannot fairly be drawn, I reasoned "the problems stemming from facelessness of personnel and from their differential levels in the administrative pecking order, which the California official described, could be common to many administrative institutions. Incremental reforms within on-going systems whose strengths and weaknesses are known may well be more efficacious than radical shifts to new administrative systems whose potentialities are, at best, inscrutable. My preference, in any event, is to try to tune the engine before we trade the car."[9]

The engine-tuning between 1975 and now by OPM has been disinterested, disfunctional and disappointing. Nothing of note remains of the 1962 understanding with the Administrative Conference, and the discouragement by the agency of research and reform initiatives by the Director of its Office of Administrative Law Judges attests further to the ripeness of the proposal for a Corps.

Additional support for the Corps concept comes from recent research by Malcolm Rich and Wayne Brucar under auspices of the American Judicature Society and embodied in a fine book titled The Central Panel System for Administrative

Law Judges: A Survey of Seven States.[10] The authors find the central panel approach to be "an increasingly used concept to balance the need for administrative justice with the goal of efficient and effective administrative action."[11] Although implementation of central panels in these seven states (California, Colorado, Florida, Massachusetts, Minnesota, New Jersey and Tennessee) has been neither uniform nor universally applauded, the record shows clearly that the Corps concept is now practicable and feasible.

The last factor for not making an ALJ Corps a priority in 1975 was what appeared then the likelihood of sustained follow-up to the La Macchia Committee study. Judge La Macchia's Committee, which was known officially as the Committee on the Study of the Utilization of Administrative Law Judges, undertook in the early 1970's systematic evaluative and "pulse taking" inquiries about the ALJ program's adequacies and inadequacies from multiple vantage points.[12] Conducted by a panel of ALJs and chaired by the Civil Service Commission's Deputy Counsel at the time, who was formerly an ALJ, the study sought the opinions and beliefs of all of the ALJs and of samples of federal agency officials, private practitioners, and bar association representatives about such matters as the quality and quantity of ALJs' work products, relationships between the judges and their agencies concerning ALJs' independence and the adequacy of facilities and resources available for their work, standards for recruitment of ALJs and standards for review of their decisions.

Although the study may not have been exhaustive or definitive in every respect, it was an invaluable initiator of an empirical base of data and opinion about the ALJ program. Particularly interesting were its findings that selective certification in the hiring of ALJs is opposed by a large majority of practitioners, bar representatives, and ALJs alike. Only the eleven agencies using it favored selective certification. The Committee found also that intermediate boards utilized to review initial decisions of ALJs often had no rules or standards regarding the qualifications or methods of selection of their members and that in some instances they materially increased the time required for completing cases without changing the substance of ALJs' initial decisions. Not surprisingly, in light of these findings, the Committee recommended limiting selective certification and urged legislation and agency rules that would make decisions of ALJs final subject to discretionary review.

No invasions of ALJ decisional independence were found in any agency practices by the Committee in its 1974 Report. Respect for independence was unanimous. With regard to opinions about the quality of ALJs' decisions, 75.3% of the 134 government attorneys practicing before ALJs and reporting to the Committee rated the quality of ALJs' decisions as "good to superior." Only 34.6% of the 52 private attorneys responding gave them that high rating, however.[13] Government attorneys and private practitioners were closer together in their evaluation of ALJ productivity, with 50.9% of the private attorneys and 59.9% of the government attorneys rating ALJs' productivity as "good to superior."[14] The Committee endorsed as feasible and desirable the establishment of a model caseload accounting system by all agencies utilizing ALJs.

The independent Corps issue was considered as well. A large majority of ALJs were found to favor creation of a Corps as a measure to improve motivation and morale. The Committee went on record as favoring "professional management analysis of the feasibility and public benefit consequences of the establishment of an independent corps."[15] Among other findings and recommendations bearing on the value of the Corps concept, the Committee noted the nebulousness of some statutes about whether § 3105 ALJs are required to conduct hearings and urged an amendment to the APA that would require explicit language citing § 3105 and § 556 and § 557 of the APA before any new statute could be construed as ordering the utilization of ALJs for its hearings.

The La Macchia Committee's 64 findings and conclusions under ten headings, ranging from appointment to utilization and morale of ALJs, were designed to provide an agenda for distillation and refinement of specific recommendations by a "second level panel" to be appointed by the Commission from among "the representatives of agencies and organizations concerned with the administrative process." Such a panel was convened in the form of an advisory committee for a brief period during President Ford's administration but was disbanded by the Carter Aadministration, as part of a general cutback in advisory committees, without any effort to consider, let alone adopt, its suggestions.

CSC and OPM have had multiple opportunities over almost four decades for development of a systematic, fair, integrative, and efficacious ALJ program. There have been several worthy starts in that direction followed by witherings, abandonments and abortions of the efforts. A fresh start through the Corps concept is warranted, promising, and practicable in S.1275, I'm happy to support it.

Footnotes

1. Rosenblum, "The Administrative Law Judge in the Administrative Process" in Recent Studies Relevant to the Hearings and Appeals Crisis, Subcommittee on Social Security of the Committee on Ways and Means, U.S. House of Representatives, 94th Cong., 1st Sess. (Committee Print Dec. 20, 1975) pp. 171-245.

2. Lester, "Report on Section 11 Hearing Examiners" to the Committee on Personnel, Administrative Conference of the United States (Aug. 23, 1962) p. 28.

3. Id.

4. Report of the Committee on Personnel, Administrative Conference of the United States (Sept. 24, 1962) pp. 25-28.

5. Report of the Administrative Conference of the United States (December 1962), Recommendation No. 28-7.

6. See as examples General Accounting Office, "Administrative Law Process: Better Management is Needed," FPCD 78-25, May 15, 1978; "Management Improvements in the Administrative Law Process: Much Remains to be Done," FPCD 79-44, May 23, 1979.

7. Coan, "Operational Aspects of a Central Hearing Examiners Pool: California's Experiences,' 3 Florida State Law Review 86 (1975).

8. Id. at p. 89.

9. Rosenblum study op. cit. p. 233.

10. Rich and Brucar The Central Panel System for Administrative Law Judges: A Survey of Seven States (Frederick, Md.: University Publications of America, 1983).

11. Id. at p. 86.

12. U.S. Civil Service Commission, Report of the Committee on the Study of the Utilization of Administrative Law Judges, (July 30, 1974).

13. Id. at p. 65

14. Id.

15. Id. at p. 66

DUE PROCESS PROBLEMS IN THE SOCIAL SECURITY SYSTEM:

A CASE FOR THE ESTABLISHMENT OF AN INDEPENDENT FORUM OF ADMINISTRATIVE LAW JUDGES IN THE DEPARTMENT OF HEALTH AND HUMAN SERVICES

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PROPOSAL

The Association of Administrative Law Judges, in the Department of Health and Human Services (DHHS), hereby proposes that the Office of Hearings and Appeals (OHA), including the corps of Administrative Law Judges (ALJs), be reassigned, by appropriate legislation, from the Social Security Administration (SSA), to an independent forum, as a separate review commission, to hear DHHS cases, thereby providing the Secretary with an adjudicative body which provides administrative justice on a full range of DHHS programs. This proposed organizational change would be consistent with organizational structures in other agencies utilizing ALJs. See, for example, the statutory language creating the Occupational Safety and Health Review Commission or Federal Mine Safety and Health Review Commission.

Procedures for adjudicating cases before the ALJs would vary with the type of case involved, program requirements, the needs of the public, etc., and would be geared to offering a range of proceedings from due process, adversary, evidentiary hearings, to non-adversary hearings. OHA already furnishes ALJs for a variety of DHHS cases not directly involving SSA, but such temporary assignments require a paper transfer arrangement.

Moreover, the present organizational structure, with OHA as part of SSA, places the ALJs in a position where they are adjudicating SSA cases for the Secretary, but appear to be organizationally controlled by the Commissioner of SSA.

SSA has, in the past, been unable, conceptually, to deal with the role of OHA and its decisional independence, resulting in strained relationships, misunderstandings, and, in some instances, lack of cooperation. Further, the increasing caseload in SSA has magnified the conceptual differences between SSA and OHA, the former attempting increased administrative control in meeting program goals, and the latter, for its part, insisting on fair evidentiary hearings.

Clearly, reassignment of OHA to an independent review commission would make better organizational sense, will enhance the appearance of justice, promote due process and the quality of justice afforded the individual litigant, and provide for a healthier and more responsive institutional "legal system." The transition would be simple and immediate; it would incur no additional cost to the government, but, conversely, in the long run, should result in reduced expenditures by permitting a more efficient operation.

SUBSTANTIVE BENEFITS AND PROCEDURAL RIGHTS - A BACKGROUND

Individuals have statutory entitlement rights under Titles II, XVI, XVIII, and IX of the Social Security Act. [1] Section 202 of the Act provides for retirement insurance benefits, child's insurance benefits, widow and widower's benefits, mother's insurance benefits, parent's insurance benefits and lump sum death payments. Section 223 provides for the payment of disability insurance benefits to qualified individuals. Section 1611 provides for the payment of supplemental security income benefit payments to aged, blind, or disabled individuals who fall within certain income and resources limitations. Section 1811 et seq. provides for the payment of hospital insurance benefits for the aged and disabled (Part A. Medicare) and Section 1831 et seq. provides for the payment of supplemental medical insurance benefits for the aged and disabled (Part B. Medicare). Section 1901 et seq. provides for federal grants to states for medical assistance programs (Medicaid).

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[1] 42 U.S.C. § 401 et seq., 42 U.S.C. 1381a et seq., 42 U.S.C. § 1395 et seq., and 42 U.S.C. § 1396 et seq.; implementing regulations are found in Title 20 of C.F.R., Employees' Benefits, Chapter III - Social Security Administration, Department of Health and Human Services (Parts 400-499) and Title 42 of C.F.R., Public Health, Chapter IV - Health Care Financing Administration, Department of Health and Human Services (Parts 400-499).

These benefits affect nearly everyone in our society - rich or poor, young or old, healthy or disabled; their importance cannot be overestimated. At the end of October 1981, the Old-Age, Survivors, and Disability Insurance (OASDI) program was paying $12.2 billion in monthly cash benefits to 35,904,374 beneficiaries. 2/ At the end of October 1981, 4,030,100 persons received federally administered supplemental security income (SSI) payments at a cost of $734.7 million. 3/ The dollar figures and number of beneficiaries in the medical programs are also staggering. 4/ At the end of fiscal year 1979 there were over 100 million people in covered employment (9 out of 10 workers). 5/

As a practical matter, the Secretary of DHHS is embodied in various bureaucratic and legal decisionmakers. As pertinent here, claims for benefits are administered and/or processed by SSA and its components, including regional offices, technical and payment review operations and the Office of Disability Operations. State agency organizations under contract with the SSA, and theoretically under federal control and supervision, make a large measure of the

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2/ Social Security Bulletin, Vol. 45, No. 2(February 1982) at 1-2.

3/ Ibid.

4/ Oasis, Vol. 26, No. 7 (July 1980) at 24.

5/ Ibid.

"Secretary's" initial determinations. In fact, they make the initial and reconsideration determinations on all disability claims. The hearings, on appeal, are conducted by ALJs, who are appointed under the civil service laws and regulations and are governed by the Administrative Procedure Act (APA). 6/ The Supreme Court has held that federal administrative agencies making determinations of a quasi-judicial nature, involving evidentiary hearings, are governed by APA. Hannah v. Larche, 363 U.S. 420. There are now approximately 730 ALJs, 409 staff attorneys, and 2500 support personnel in OHA, which is organized as part of SSA, which, in turn, is a subdivision of DHHS. 7/ However, OHA furnishes ALJs for a variety of DHHS cases not directly involving SSA.

Due process procedural rights are guaranteed to Social Socurity claimants by the 5th Amendment to the Constitution, Supreme Court decisions, the Social Security Act itself, and the APA. The 5th Amendment is one of the most important cornerstones of individual freedom and justice in our country, and its language is ringingly poetic: "No person

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6/ Administrative law judges are appointed pursuant to 5 U.S.C. §§ 551-552, 553-559, 701-706, 1305, 3105, 3344, 5362, 751(1976), as amended in part by Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111; ALJs are within 5 C.F.R. § 930.211 and the hearings are governed by the Administrative Procedure Act as well, 5 U.S.C. §500ff.

7/ U.S. Department of HHS, SSA Operational Analysis of the Office of Hearings and Appeals, Pubn. No. 70-031 (6-81) (September 30, 1980) p. 40; see also Memorandum from Louis B. Hays, Associate Commissioner, OHA, SSA, DHHS to OHA field office, January 20, 1982.

shall be...deprived of life, liberty, or property without due process of law..."

The Supreme Court has explicitly and repeatedly recognized that due process safeguards apply to the Social Security hearing process. Goldberg v. Kelly, 397 U.S. 254 and Richardson v. Perales, 420 U.S. 389. Goldberg and Richardson are landmark decisions and are helpful in outlining the dimensions of due process in the administrative context. "Fundamental fairness" is required and the threshold element in this concept is an opportunity to be heard at a meaningful time in the process and in a meaningful manner. A reasonable opportunity to present the case, including the right to confront and cross-examine adverse witnesses and the right to be represented by counsel, are basic elements of due process. Of course, fundamental fairness, if it means anything at all, includes the right of an individual to have his case decided by an unbiased, impartial, decisionmaker. This common sense notion of impartiality is the key to due process and, unfortunately, is often overlooked by the bureaucracy. The Goldberg decision elaborated on the acceptable basis of a decision. The Supreme Court held that the decisionmaker's conclusion must rest solely on the pertinent legal rules and evidence adduced at the hearing and, to demonstrate compliance with this elementary requirement, the decisionmaker must state the reasons for his determination.

Due process procedural safeguards also exist in the Social Security Act. While Section 205(a) gives the Secretary broad powers to govern the process of admininistering benefits, it contains two important constraints. 8/ First, it provides that the Secretary's rules, regulations, and procedures must not be inconsistent with the Social Security Act. Moreover, Section 205(a) provides that said rules, regulations, and procedures must be necessary or appropriate and that they must be both reasonable and proper.

Section 205(b) of the Social Security Act provides that, if an individual is prejudiced by any decision which the Secretary has rendered, then the individual has a right to reasonable notice and opportunity for a hearing, and that, if a hearing is held, then the individual has a right to a decision made on the basis of the evidence adduced at the hearing.

Section 205(g) of the Act gives individuals the right to obtain judicial review of the final decision of the Secretary by a civil action in the federal district courts and to have that decision overturned if not supported by substantial evidence. Substantial evidence has been defined as "more than a scintilla, but less than a preponderance."

8/ Section 205(a) of the Social Security Act, 42 U.S.C. § 405(a) provides:

> The Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of the title, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

Thomas v. Celebrezze, 331 F.2d 541 (4th Cir. 1962). The Supreme Court described it as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389 (1971). "While it is not the Court's function to try the case de novo, nor to reweigh the evidence or substitute its judgement for that of the Secretary, Hayes v. Gardner, 376 F.2d 517 (4th Cir. 1967), the court must determine whether the Secretary applied the correct legal standard. Knox v. Finch, 427 F.2d 919 (5th Cir. 1970), and whether his conclusions have a reasonable basis in law, Hicks v. Gardner, 393 F.2d 299 (4th Cir. 1968)." Taylor v. Matthews, Civil Action No. M-75-704 (D. Md. February 2, 1976, Memorandum and Order).

Additional procedural protections are afforded by the APA in order to ensure that individuals receive "due process of law" when dealing with the government. 5 U.S.C. § 554(b) provides for adequate notice of hearing and Section 554(c) provides for access to evidence. The right to cross-examine is recognized in Section 556(d) and the right to be accompanied by counsel is contained in Section 555(b). Section 557 requires written findings and reasons for the decision, and Section 556(e) mandates that the decision be based on the evidentiary record. Section 556(b) provides that the person taking the evidence and rendering the decision be impartial. Moreover Section 551 grants ALJs qualified independence from the agency for which they work by assigning responsibility for determining their qualifications, compensation, and tenure to the Office of Personnel Management.

THE PROBLEMS

Case Explosion

Procedural due process assumes that the decisionmaker will have an adequate time to study and decide the case. The current explosion in SSA hearing requests renders this an assumption bordering on fantasy. It is clear that the hearing crisis is largly the direct result of SSA policy (1) to conduct wholesale continuing disability investigations at an accelerated pace in order to terminate benefits of those no longer disabled, and (2) the application of "tightened" standards, resulting in increased denial rates at the lower levels of adjudication. Such actions, if unchecked, can interfere with fundamental fairness, the reasonable and proper constraints of Section 205(a) of the Social Security Act, and the principles of impartial decisionmaking inherent in the 5th Amendment and contained in Section 556 of the APA.

The administrative law system for adjudicating SSA claims has been expanding at a spectacular rate over the last five years, even though the number of applications has, recently, slightly declined. In fiscal year 1976, there were 1,819,261 applications, with only 143,196 requests for hearing. In fiscal year 1980, applications were down to 1,695,906, but requests for hearing have skyrocketed to 239,171. Projections of hearing receipts are staggering.

In fiscal year 1981, 275,000 hearing requests are anticipated, 340,000 in fiscal 1982, and 416,000 in fiscal 1983. The reason for the phenomenal increase is directly related to the increasing State agency denial rates on both new applications and termination cases. In fiscal year 1976, the initial denial rate at the state agency level was 41.6% and the reconsideration denial rate was 72.3%. In fiscal year 1980, the initial denial rate had increased to 60.4%, and the reconsideration denial rate had risen to 82.2%. 9/

The increase in denials has caused the pending cases at OHA to rise to new levels - 128,551 as of August 1981, with projections at 200,000 in two years. 10/ It is the Association's view that these estimates are quite conservative. Inevitably, it is taking progressively longer to obtain a hearing decision. Several courts have held that due process and statutory rights are violated when a hearing and decision are not afforded claimants within a reasonable time. The principal case is Blankenship v. Secretary of HEW, CCH Unemployment Ins. Rep. ¶ 14739 (W.D. Ky., May 6, 1976), 587 F.2d 329 (1978), which, ironically, is itself taking an extraordinary amount of time and is still in active litigation. One federal court has even ordered that the Secretary pay

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9/ U.S. Department of HHS, SSA, OHA Law Reporter, Vol. V, Pubn. No. 70-002 (April 1981) pp. 38-39; see also Note 7 supra.

10/ Staff of House Subcommittee on Social Security of the Committee on Ways and Means, 97th Cong., 1st Sess., Social Security Hearings and Appeals: Pending Problems and Proposed Solutions (Comm. Print 97-24).

presumptive benefits to claimants who are not given hearings and decisions within prescribed time limitations, White v. Mathews, 559 F.2d 852 (2d Cir. 1977), cert. denied, 435 U.S. 908 (1978). In the Blankenship case, the court, in its latest order dated September 7, 1981, has hinted very strongly that it views presumptive payment as an appropriate remedy:

> Thus the Sixth Circuit has recognized the classic situation of a wrong coupled with an injury. We believe that where the claimant has been deprived of rights as a result of delays not attributable to the claimant, this deprivation, at least where it results in substantial hardship, can only be corrected by commencing payment of benefits, subject to the right of recoupment. 11/

As alluded to above, a primary reason for the increasing caseload is that SSA is terminating benefits at progressively higher rates. The present administration has stepped up continuing disability investigations (CDIs), which would have been effective at a later date under the 1980 Disability Amendments. 12/ In 1981, there were 314,000 CDIs, in 1982, 520,000 CDIs are planned, and in 1983, 832,000 are projected. 13/ The data available to date indicates that there have been 19,750 continuances of benefits and 18,577 cessations and the termination rate and reconsideration denial rate has

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11/ Blankenship v. Secretary of HEW, Civil No. C76-C441 L(A) (W. D. Ky., September 7, 1981).

12/ Public Law 96-265.

13/ See note 10 supra.

been greater than estimated. 14/

It should be also noted that the increased denial rate has similarly caused a substantial caseload in the federal district and appellate courts. Currently, there are 19,000 cases pending, with new cases being filed at the rate of 9,000 every year. 15/ Since the federal courts render only 4,600 decisions per year, it can be roughly estimated that by the end of December 1982 there will be 23,400 social security cases in the federal courts. 16/

Criticism of ALJs and Indirect Pressure to Deny

Many media representatives, experts in administrative law, and ALJs perceive that there is indirect pressure being placed on ALJs to deny claims - such pressure taking the form of public criticism by government officials, SSA statistical studies, and the "Bellmon Amendment." These ostensibly detrimental influences, if extant, may constitute an infringement upon due process because they are offensive to the concepts of fundamental fairness and requirements of impartiality contained in the 5th Amendment, case law, and Section 556 of the APA.

The ALJ allowance rate in fiscal year 1975 was 41.9% and by 1980 it had grown to 55.7%, and the CDI allowance

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14/ Ibid.

15/ *See* note 10 *supra*, at 12.

16/ *See* note 10 *supra*, at 18.

rate is even higher. 17/ The ALJs have been severely criticized for this increase and the apparent disparity between the levels of adjudication. Mr. Paul Simmons, Deputy Commissioner for External Affairs, SSA, in a published interview has stated:

> What's happening out there in the hearings process defies rational explanation. And it's doing more to undermine public confidence in the day-to-day workings of this agency than anything else. 18/

The implication is clearly that ALJs are paying too many people. In fact, more recently, in May 1982, Mr. Simmons expressed the opinion, before the Senate Subcommittee on Oversight of Government Management, Governmental Affairs Committee, that State agency "lay" disability examiners (which positions require only a high-school education), by reason of their training, are better able to assess disability than are the ALJs. Overlooked, of course, is the fact that ALJs are lawyers, selected by a rigorous, competitive, merit-selection process, most of whom have had extensive "legal" experience in disability cases, and all of whom have also been trained in vocational, medical and legal subjects pertinent to disability determinations. The foregoing opinion of Mr. Simmons boggles the mind.

Further, Mr. Louis B. Hays, Associate Commissioner of OHA, in his Congressional testimony in October 1981, stated:

> The second major area requiring our immediate attention is the need to improve the quality and consistency of the process. The most obvious indicator of the overall lack of consistency is the reversal rate at the hearing

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17/ See note 10 supra, at 44.

18/ Oasis, Vol. 12, No. 8 (August 1981) at 33.

> level. Lower level decisions for all categories of cases are now being reversed by ALJs at a rate of 55.3 percent. The reversal rate of Title II disability cases alone is now about 60 percent. 19/

In a recent Congressional staff report, it was indicated: "Moreover, the federal quality assurance system's most recent statistics indicate a very high accuracy rate for the State agency reconsideration determinations." 20/ The point was that, if the State agencies are so accurate, then the ALJs must be in error. The so-called "quality assurance studies" were conducted by the Office of Disability Operations, SSA. In essence, the study was performed by SSA program officials who are charged with the responsibility of supervising the State agencies and, thus, they have a vested interest in showing that the State agencies are performing well. The results are, therefore, not surprising. It was found that there were "no substantial deficiencies in State agency evidentiary development, case processing, or disability evaluation, as these activities are generally practiced at the reconsideration level." 21/ It was reported that 86 percent of all cases studied were sufficiently developed at the reconsideration level and, in 79 percent of ALJ reversals, all relevant issues and questions were resolved in the

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19/ Testimony by Louis B. Hays, Associate Commissioner of SSA - Office of Hearings and Appeals before Social Security Subcommittee, October 23, 1981.

20/ *See* note 10 *supra*, at 9.

21/ Hinckley, *The SSA Disability Appeals Reform Experiments; Probing For Improvement*, U.S. Department of HHS, SSA, OHA Law Reporter, Vol. V, Pubn. No. 70-002 (April 1981) at 34.

reconsideration determination. 22/ It will be demonstrated that these conclusions are hopelessly flawed and self-serving. It should also be noted that the inadequacies of SSA program officials have been documented by the Comptroller General. 23/

The criticism of the ALJ reversal rate led to the passage of the "Bellmon Amendment." Senator Bellmon put forth his legislation to "strengthen one of the weakest links in the disability adjudication process" 24/ in order to achieve "better assurance that disability awards are not being granted inappropriately in a large number of cases." 25/ Section 304(g) of P.L. 96-265 requires the Appeals Council, on its own motion, to conduct pre-effectuation review of ALJ decisions favorable to the claimant. The Commissioner of SSA had reported that this review is being conducted in a two-stage process: (1) 3600 cases in a random sample and (2) target sampling of individual ALJs and hearing offices that have high reversal rates. 26/ This

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22/ Ibid.

23/ GAO, Control Over Medical Examinations Is Necessary for the SSA to Better Determine Disability, HRD-79-119 (October 9, 1979); GAO, The Social Security Administration Should Provide More Management and Leadership In Determing Who Is Eligible for Disability Benefits, HRD-76-105 (August 17, 1976); GAO, The SSA Needs to Improve Its Disability Claim Process, HRD-78-40 (February 16, 1978); GAO, A Plan For Improving the Disability Determination Process By Bringing It Under Complete Federal Management Should Be Developed, HRD-78-146 (August 31, 1978).

24/ 125 Cong. Rec. 719 (daily ed. January 31, 1980).

25/ Ibid.

26/ See note 10 supra, at 11.

latter kind of review has a chilling effect on ALJs. For example, if an ALJ has a string of favorable decisions, he must inevitably look to the subsequent cases with a more critical eye, and may be more disposed to denying cases for fear of being blacklisted as a "high reverser."

The "Bellmon Report" was issued in January 1982 and contains no surprises. The Association has published its response to such report in "A Critique of the Bellmon Study", finding that "the differences between lower-level and judge-level allowance rates are fully within reasonable expectations," especially in view of specified case-handling deficiencies at the lower levels of case processing. However, the Association makes clear, in the critique, that it has no objection to ongoing review of judge decisions, in the interest of improving the "system", provided that appropriate, unbiased, and otherwise qualified individuals are utilized in the program, and that a more random - sampling approach is applied.

Overemphasis on "reversal" and "affirmation" rates by the ALJs demonstrates a fundamental misunderstanding of the administrative hearing process. The ALJ determinations are de novo adjudications. A trial de novo is "a new trial or retrial had in an appellate court in which the whole case is gone into as if no trial whatever had been had in the court below." 27/ Section 205(b) of the Social Security Act explicitly provides that the Secretary can affirm, modify or

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27/ Steven H. Gifis, Law Dictionary (Woodbury, Barron 1975), p. 212.

reverse his findings of fact, and reverse the decision at the lower level - he is not bound in any way by his previous denial determination.

The individual cases that make up the "reversal" rate should be more closely analyzed. In a crude way, it can be conceptualized that, when an ALJ issues a completely favorable decision for the claimant, he has "reversed" the lower level determination. However, the makeup of the reversal rate contains decisions which are only partially favorable to the claimant. Several examples come to mind: (1) an award of a closed period of disability, (2) awards with different onset dates than alleged, (3) termination of entitlements with different cessation points, (4) concurrent split decisions, i.e., Title II disability benefits denied because disability began subsequent to expiration of insured status but Title XVI disability benefits granted; (5) cessation overpayment cases where cessation is affirmed but overpayment liability is waived or determined in different amounts than the lower level determinations, and (6) situations where disability is found but entitlement is conditioned upon active participation in a rehabilitation program and appointment of a representative payee. In all of these fact patterns, it is inaccurate to imply that the ALJ has "reversed" the prior determination by giving the claimant a wholly favorable decision.

The actual reasons behind rising State agency denial rates and the disparity between ALJ and State agencies denial rates are difficult to assess, and may be the result of an inadvertent tightening of criteria at the State agency level, or the inability of State agencies appropriately to handle the increased workload. The increase in State agency denial rates may also stem from a desire by the agency to reduce the amount of dollar benefit payout. This is being accomplished despite the increase in ALJ reversal (allowance) rates. In fiscal year 1976 there were 1,819,261 applications; this figure breaks down to 1,061,776 initial awards and 757,485 denial determinations. Out of this denial determination figure, 143,196 people requested a hearing, and with a 45% reversal rate by ALJs, this would result in an additional 64,438 hearing awards, bringing the total awards in 1976 to 1,126,214. This figure would not include subsequent federal court awards. In fiscal year 1980, there were 1,695,906 applications; this figure breaks down quite differently than in 1976, however. There were only 671,604 initial awards as the State agencies went from a 41.6 percent denial rate to a 60.4 percent denial rate. Even though requests for hearing skyrocketed to an all time high of 239,171, and the ALJ reversal rate has increased to 55.7%, the additional ALJ awards of 133,218 brought the total amount only to 804,822. Thus, it can be seen that, even considering the reduction of the applications filed, analytical computation reveals a net decrease in awards by 198,037. 28/

By increasing the numbers of people denied (in the

28/ See note 9 supra.

range of 200,000), programs actuaries can save the SSA trust funds $50,000 per Title II claim and general revenues can be saved in the amount of $30,000 per Title XVI claim - a total savings of $8 billion if the increased denials were allocated equally between the two programs. 29/ Moreover, for each individual denied benefits, there are great savings in Medicare and Medicaid benefit payouts, because disabled individuals qualify for these entitlements.

Many reasons have been put forth for the discrepancy in reversal rates. More traditional cause and effect rationales include the following: (1) claimant's condition has changed, (2) new evidence has been submitted, (3) the hearing stage is the first time that there is face-to-face confrontation, (4) vigorous participation of claimant's representatives, (5) ALJs have more flexibility and discretion, or (6) different adjudicatory standards are applied. As indicated above, a careful analysis of the reality of the overall processing system reveals that such reasons are only partial answers, and that increasing denial rates, caseload pressures, and increasing error rates at the lower levels, are significant contributing factors.

29/ See note 23 supra.

Management initiatives and regulatory changes have also brought about interesting results. There has been substantial pressure on ALJs to produce ever-increasing numbers of decisions and, to this end, "short form fully favorable decisions" were introduced over a decade ago. ALJs were encouraged to issue a two page abbreviated decision, instead of issuing a comprehensive long form decision of several pages, covering the procedural history, issues, laws and regulations, summary and evaluation of the medical, vocational and other evidence, rationale for the decision, and specific findings and conclusions. The first page was a preprinted form with blanks for the application and onset dates, and the second page was a "memorandum to the file" outlining the reasons for the award. The rationale for such "short form" decision appears to have been that fully favorable decisions did not require as much explanation since they would not be subject to appeals by satisfied claimants, and should take less time to prepare, thus, giving an opportunity to increase productivity. Unfortunately, the use of short forms led to some sloppy work, and some ALJs may have used them inappropriately. It is not suggested here that any ALJ fell prey to the availability of such short cut at the expense of an incorrect decision. But one can envision this happening under severe pressure to produce. It is interesting to note that the present Associate Commissioner of OHA has ordered that the use of short forms be discontinued because, among other reasons, it may constitute a violation of § 205(b) of the Social Security Act. 30/ The use of the short form, coupled with the fact that favorable ALJ decisions, beginning in 1975, were no longer reviewed, may have had an impact on the reversal rate. While it is inappropriate to target individual judges for review due to high reversal rates, it is good management practice to monitor all decisions for accuracy and quality.

One of the most significant factors in the increased reversal rate at the hearing level was the advent of the new "grid" regulations, which were published in the Federal Register on November 28, 1978, and which became effective on February 26, 1979; these regulations are now contained in 20 C.F.R. 404.1501 et seq. and 20 C.F.R. 416.901 et seq. Such regulations were touted as a codification of existing policy and interpretation of the regulations. In fact, among certain categories of claimants, it liberalized the law. For example, the "grids" mandate an award to an individual who has no work experience or is precluded from performing his vocationally relevant past work activity (assuming it required something greater than a sedentary level of physical exertion), who is currently limited to a sedentary residual functional capacity, who has no transferable skills, and who is 50 years of age or older. This was not the case prior to the passage of these regulations and appears

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30/ Memorandum from Louis B. Hays, Associate Commissioner, OHA, SSA, DHHS to OHA file offices, December 17, 1981.

contrary to the intent of Congress. These regulations have been applied conscientiously by the ALJs, as interpreted by the courts, but applied erroneously to varying degrees at the lower levels, based on instructions from the Office of Disability Operations in the form of a Program Operations Manual.

The Threat of Interference With The Administrative Law Judge Decisionmaking Process: The Destruction of Integrity

It cannot be controverted that administrative interference with the decisional independence of ALJs, if it occurs, would have the direct effect of denying due process of law to claimants -- individually and as a class. A weakness in the administrative law system is the fact that ALJs are assigned to and paid by the agencies for whom they conduct hearings under the APA. Real power remains with the agency for which the judges are adjudicating -- here, SSA. Some have charged that the Agency, through its administrative powers, has attempted, particularly in the recent past, to achieve greater control over ALJs, to the detriment of the precepts of fundamental fairness, the goal of impartiality recognized by the 5th Amendment, Sections 556 and 551 of the APA, and the constraints of Section 205(a) of the Social Security Act.

OHA may have been, in the late 1970's and 1980, "an agency at war with itself, as reported in a Congressional survey paper. 31/ Management officials at the central and regional levels have been dominated by SSA policy, and they have, in the past, demonstrated a bureaucratic mentality that admits only to "production", at the expense of the quality of due process or even the accuracy of decision-making, 32/ despite ip service to the latter. There has been a destructive conflict between the "managers" of the Agency and the lawyers and other professionals. This conflict has led to litigation, most of it caused by the frustration of the Agency personnel with dealing with management over the issue of fairness to the public. 33/ In the past, management officials have been unnecessarily abrasive and have

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31/ Staff of House Subcommittee on Social Security of the Committee on Ways and Means, 96th Cong., 1st Sess., Social Security Administrative Law Judges: Survey and Issue Paper (Comm. Print 96-2) at 3-6.

32/ Ibid. at pp 5-6:

> The subcommittee staff believes that because of the great increase in hearing requests in the last 4 years, the greater emphasis in all phases of the process has been placed on "moving the cases" rather than rendering fair and sound decisions. Up to now, in BHA's continuing struggle to achieve a balance between quantity and quality, the definite winner has been quantity.

33/ Ibid. p. 111.

been criticized for a lack of integrity. 34/ ALJ case disposition rates has substantially increased, but can be attributed more to increases in budget and manpower rather than the activities of management. In any case, production has reached unprecedented heights, but increased pressure to "move the cases" may produce irreparable harm to the quality (fairness and accuracy) of the decisionmaking process.

Two lawsuits highlight the conflict between due process concerns of the ALJs and the prerogatives of administrative policy. As previously discussed, the Constitution, § 205 of the Social Security Act, and various provisions of the APA, govern the hearing process. In Bono v. Califano, United States District Court for the Western District of Missouri, Western Division (Civil Action No. 77-0819-CV-W-4), five judges alleged that management practices of the SSA/OHA impinged upon their qualified judicial independence and impermissibly interfered with their constitutional, statutory, and case law duty to provide procedural due process for

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34/ Ibid. p 4:

> The crux of the argument of all these "professionals" is that beginning in 1975 "manager" type employees were inserted in almost every level of BHA to bring order to what the SSA leadership considered to be a disorderly administrative organization which was faced by a growing backlog of cases. The Director and the new managers came in relatively "hardnose" and our ALJ survey indicates that openness with employees, and keeping them abreast of new initiatives was not BHA's high suit.

Social Security claimants. The plaintiffs maintained that various regulations, orders, directives, memoranda, policies, and instructions 35/ have the effect of rating the performance of individual ALJs; usurp the authority of ALJs to designate the time and place of hearings; establish procedures whereby ALJs are pressured to meet arbitrary numerical quotas; violate statutory requirements that ALJs be assigned cases in rotation; arbitrarily assign judicial and quasi-judicial functions to staff other than ALJs; and publicly demean and impugn the integrity of individual ALJs. The Bono suit was settled in June 1979, when management agreed to revise its policies regarding training, transfer, and travel policies, and the use of production statistics and goals for the ALJs. It is claimed by some ALJs that management has ignored the spirit and terms of this settlement, and the Association is now considering whether to

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35/ As previously discussed, the law requires a decision "on the record" exclusively. It is reasonable to include applicable federal statues, regulations, and case law as well as the evidentiary exhibits in the record. However, ALJs are deluged with SSA policy material, that influences them, which is not properly within the record. This policy information is included in the OHA ALJ handbook, interim circulars, internal memoranda, program policy statements, Social Security Rulings, and a variety of other administrative directives and instructions. It can be useful but it is often biased in favor of the agency and is without the force of reason or law. A good example of the propaganda nature of the material is Program Policy Statement, No. 64 (March 4, 1982) which provides that ALJs shall give probative weight to DDS staff physicians' assessments of residual functional capacity.

petition to have this suit reopened. 36/

An even more interesting case is that of Nash v. Califano, a decision of the U.S. Court of Appeals for the Second Circuit, Docket No. 79-6180, decided January 7, 1980. Judge Nash persuasively argued that management activities violate the rights of claimants to procedural due process, as required by law. He asserted that the "regional Office Peer Review System" violates 5 U.S.C. § 556 because, through it, the Agency has effectively seized the power to control hearings, and that arbitrary monthly production quotas constitute a performance rating of individual judges in violation of the APA, 5 U.S.C. §4301(2)(E) and 5 C.F.R. § 930.211. He also argued that the mass production techniques of the "employee pool system" violate 5 U.S.C. §§ 556(c) and 3105. Judge Nash also alleged that the agency's "Quality Assurance Program", which provides for counseling and admonishing judges to keep their rate within SSA norms, is a violation of the APA, 5 U.S.C. §§ 556 and 3105.

The U.S. Court of Appeals overruled the district court's dismissal of the action and explicitly held that Judge Nash possessed standing; subsequently, the district court, on remand, certified the suit as a class action and the case is still in litigation. Judge Irvin R. Kaufman, of the Court of Appeals, expressly recognized the legitimate existence of ALJ limited independence under the APA, regulations, and

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36/ See note 10 supra, at 25.

controlling case law. 37/ While he stated that he was not giving an opinion as to the substantive merits of the complaint, a careful reading of his decision indicates that he felt strongly that it is imperative that the law protect the decisional independence guaranteed to ALJs, not for their own personal benefit, but to ensure that claimants receive impartial judgments free from the corrupting influence of the agencies:

> The independent judiciary is structurally insulated from the other branches to provide a safe haven for individual liberties in times of crises. By analogy, "the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgement on the evidence before him, free from pressures by the parties or other officials within the agency." Butz v. Economou, 438 U.S. 478,513 (1978). 38/

In Blankenship, supra, the Agency attempted to comply with the court's requirement for a remedy, such as presumptive payment, in undue case-handling delays, by proposing specified sanctions against, or controls over, ALJs... in essence, offering up the ALJs as a collective sacrificial lamb. The Association opposed such action in a petition to intervene, and the judge rejected the Agency's proposals as inappropriate. The implication of the Agency's action clearly is that the Agency considers the ALJs to be responsible for case-handling delays, rather than deficiencies in the Social Security system, as enumerated herein, and seeks to achieve compliance

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37/ Ramspeck v. Trial Examiners Conference, 345 U.S. 128 (1953); Butz v. Economou, 438 U.S. 478 (1978).

38/ Nash at 818.

withold the authority to hire and/or fire ALJ staff, refuse travel voucher approval, refuse training or continuing legal education, and engage in harassment practices. Management at the regional or central office level, can effectively control day-to-day operations of field offices, and can control the staff in order to manipulate indirectly the judges. Judges can be "blacklisted" for having too high a reversal rate or for any other practice that is deemed incompatible with SSA policy, and they can be placed on a select list for Appeals Council own motion review.

Countless studies document the power and reality 41/ of management to intimidate ALJs. The January 1979 Report of the Subcommittee on Social Security cited the following management practices as violations of ALJ independence and compromising due process: (1) the establishment of a high case production goal, (2) warnings to low producers that removal action would be initiated if their production did not improve, (3) requiring judges to hear a minimum (high) number of cases when they travel, and (4) considering an ALJ's production rate in deciding whether the ALJ would be transferred to a location of his or her choice. A GAO report in June 1981 identified other practices, including the publication of production and disposition rates of

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41/ See note 11 supra, at 24; GAO, SSA Policies for Managing Its Administrative Law Judges, HRD-81-911 (June 2, 1981); see note 33 supra; GAO, Administrative Law Process; Better Management Is Needed, FPCD-78-25 (May 15, 1978); GAO, Management Improvements In The Administrative Law Process: Much Remains To Be Done, FPCD-79-44 (May 23, 1979).

judges, hearing office visits by the deputy chief ALJ to investigate high reversal rates in order to satisfy a Social Security Regional Commissioner, targeting for review individual judges who have high reversal rates, and placing quotas on staff attorneys and, thereby, placing quotas on judges indirectly.

SSA's Application of Erroneous Standards

It is clear that the State agencies are applying standards for determining disability, at the direction of SSA, which are more strict than that applied at the hearing level. Section 205(a) of the Social Security Act mandates generally that the Secretary's rules, regulations, and procedures be consistent with the Social Security Act and that they be appropriate, reasonable, and proper. Section 223(d)(1)(A) of the Act provides that "disability" means "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." Section 223(d)(2) provides that, for purposes of paragraph (1)(A), an individual "shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy..."

The case law has evolved, concerning the burden of proof, as follows: Once an individual proves that he is precluded from performing his past work, then the burden shifts to the Secretary to show what other work the claimant can do. Kerner v. Celebrezze, 340 F.2d 736 (2d Cir.), *cert. denied*, 382 U.S. 861 (1965) and its progeny. The Secretary is able to satisfy his burden by taking administrative notice of sedentary and light jobs available in the national economy and through the use of vocational expert testimony. The grid regulations, 20 C.F.R. 404.1501 *et seq.* and 20 C.F.R. 416.901 *et seq.*, were devised to reduce the necessity of calling vocational experts to testify at hearings by expanding the notice dimension of the disability analysis through medical/vocational guidelines in the form of rules designed on "grid tables", based upon residual functional capacity, age, education, and work experience variables. A sequential evaluation analysis is required by the regulations (see 20 C.F.R. 404.1520 and 20 C.F.R. 416.920). The sequence is as follows: (1) is the claimant currently engaged in substantial activity? (2) does the claimant experience a severe impairment? (3) does claimant's severe impairment meet or constitute the medical equivalence of an impairment listed in 20 C.F.R., Part 404, Subpart P, Appendix I? (4) is the claimant precluded from performing his vocationally relevant past work activity? (5) is the claimant precluded from performing all other work activity as well, considering the vocational factors of age, education, and transferable skills?

Often, the rationale for denial determinations is a finding by the State agency that the claimant does not suffer from a severe impairment, i.e., the claimant does not suffer from an impairment or combination of impairments which significantly affects the ability to perform basic work-related functions (see 20 C.F.R. 404.1521 and 20 C.F.R. 416.921). The regulations define basic work activities to include - (1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling; (2) Capacities for seeing, hearing, and speaking; (3) Understanding, carrying out, and remembering simple instruction; (4) Use of judgment, (5) Responding appropriately to supervision, co-workers and usual work situations; and (6) Dealing with changes in a routine work setting (see 20 C.F.R. 404.1521 and 20 C.F.R. 416.921). Almost all claimants, except those few with frivolous claims, have "significant' restrictions and, therefore, a "severe" impairment. It might be granted that to define a severe impairment in terms of significant restrictions is redundant but, nonetheless, this is the language of the regulations.

If it is inappropriate to say that the claimant does not suffer from a severe impairment, the next most frequent denial rationale of the State agencies is that the claimant's impairment does not meet or constitute the medical equivalence of any impairment contained in the "Listing of Impairments" contained in 20 C.F.R., Part 404, Subpart P, Appendix 1. Once again, this is not the standard of the statute, regulations, or case law which mandate that the decisionmaker also consider vocational factors and such subjective factors as pain. Moreover, it should be noted that the criteria of the

Listings are very demanding and that, to satisfy them, one must almost be near death, experiencing a life threatening situation or be overwhelmingly physically or mentally incapacitated. A few illustrations are in order. To satisfy Listing 1.05 Disorders of the Spine, B. Osteoporosis, an individual must have generalized osteoporosis (established by x-ray) manifested by pain and limitation of back motion and paravertebral muscle spasm, with x-ray evidence of either: (1) Compression fracture of a vertebral body with loss of at least 50 percent of the estimated height of the vertebral body prior to the compression fracture, with no intervening direct traumatic episode; or (2) Multiple fractures of vertebrae with no intervening direct traumatic episode. In order to meet Listing 4.02, Congestive Heart Failure, one must have cardiovascular disease manifested by evidence of vascular congestion such as hepatomegaly, peripheral or pulmonary edema, with persistent congestive heart failure on clinical examination, despite prescribed therapy or persistent left ventricular enlargement and hypertrophy, documented by both extension of the cardiac shadow (left ventricle) to the vertebral column on a left later chest roentgenogram and specific electrocardiograph findings. In order to satisfy Listing 12.05, Mental Retardation, Subsection A., an individual must be experiencing severe mental and social incapacity as evidenced by marked dependence upon others for personal needs (E.G., bathing, washing, dressing, etc.), an inability to understand the spoken work and inability to avoid physical danger (fire, cars, etc.), an inability to follow simple directions, and an inability to read, write, and perform simple calculations. Moreover, it should be noted that claimants could be in compliance with 90% of two or more Listings, thereby being severely impaired, and yet fall short of entitlement that is based upon a strict requirement that it is necessary to fully meet at least one specific Listing, or the equivalent thereof - an interpretation that is universally applied.

A study of ALJ reversals in Region I, conducted jointly by the OHA Regional Chief Judge and the Assistant Regional Commissioner of Social Security, Programs, documents that the State agencies and ALJs are applying differing criteria of eligibility. 42/ Substantial variations in approaching mental cases were cited. It was reported that State agencies were of the view that a younger worker had to nearly meet or equal the severity level of the Listings to be allowed benefits. Youth was viewed as such a favorable vocational factor that anything less than the Listings was insufficient to qualify for benefits. Moreover, it was found that the State agencies used only "medical" evidence in determining whether a mental impairment was severe. Sheltered workshop data or vocational rehabilitation reports, demonstrating that the claimant could not sustain work at a level which

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42/ Memorandum from Assistant Regional Commissioner - Programs, Edward A. Monkevich and Regional Chief ALJ of Region I, William B. Lisner to Regional Commissioner of SSA, March 2, 1981, Report of SSA Region I Study of ALJ Reversals of State Agency Decisions; reprinted in Staff of House Subcommittee on Social Security of the Committee on Ways and Means, 97th Cong., 1st Sess., Status of the Disability Insurance Program (Comm. Print 97-3).

meets the standards for "substantial gainful activity" or competitive industry norms on a continuing basis, were rejected because it was "lay" evidence. It was noted that the State agencies viewed the claimant's impairment in a very narrow time-frame and that the exclusive rationale for many denials was that the claimant was oriented in three spheres and demonstrated no delusions, hallucinations, or thought disorder.

It was discovered that State agency physicians gave residual functional capacity evaluations which were different from medical assessments of limitations proffered by treating physicians and consultative examiners, and gave no bases for the conclusions reached. It was also reported that the Program Operations Manual, prepared by the Office of Disability Operations and used by State agencies, states that there should be very few cases in which claimants' residual functional capacity is reduced below the full range of sedentary work because the individual's impairments would meet or equal the level of severity required by the Listings. This policy is far removed from reality. There is a huge gulf between the severity required by the Listings, on the one hand, and the demands of sedentary work activity, on the other, and many claimants fall within that gap.

Institutional pressures were also identified as a reason for high denial rates. It was found that State agency processing time constraints led to increases in the denial rate because decisions were made without all of the evidence. The SSA review process was found to encourage State agency denials because 100 percent of decisions favorable to claimants were reviewed, while only 10 percent of the denials were examined.

In a subsequent article, the RCALJ conducting the study, William B. Lisner, reported that the State agencies are instructed by the SSA Disability Program Branch to base the entire disability determination on the medical judgment of their staff physicians and to disregard the opinion of treating and consulting physicians, vocational factors, and pain. 43/ Judge Lisner's comments provide a poignant insight into the reversal rate discrepancy: "The DDSs have been receiving the message from SSA, mostly indirectly, that doubts about a disability decision should be resolved by a denial rather than by an allowance. The ALJs have received no such message." 44/ The Association submits that the judges are similarly receiving the denial message in no uncertain terms, albeit indirectly. Despite warning signals from the OHA policy council 45/ and pending

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43/ Lisner, Escalating State Agency Denial Rates And Their Impact On OHA, U.S. Department of HHS, SSA, OHA Law Reporter, Vol. V, Pubn. No. 70-002 (April 1981) at 40.

44/ Ibid.

45/ A January 1981 OHA Policy Council (the OHA Policy Council is an advisory body of SSA ALJs that regularly consults with the OHA Director) resolution stated:

> The Council unanimously urges the Associate Commissioner to continue to impress upon the Commissioner of SSA (our) concerns about the declining rate of State Agencies' allowances, and the continued use of a different standard in adjudicating disability cases of OHA and the State Agencies, all of which has caused an unnecessary increase in the workload and reversal rate of the Office of Hearings and Appeals.

litigation, 46/ SSA remains steadfast in their practice of maintaining a more strict standard of entitlement at the lower level. Moreover, this approach is completely at odds with the legion of controlling case law to the effect that the Social Security Act is a remedial statute and should be liberally construed. Allison v. Celebrezze, 238 F. Supp. 667, (W.D.S.C. 1964); Rosenberg v. Richardson, 538 F.2d 487 (2d Cir. 1976); Walston v. Gardner, 381 F.2d 580 (6th Cir. 1967).

Consultative Examinations and the Quality of the Record

Section 205(b) of the Social Security Act and Section 556(c) of the APA require a decision based on the evidence of record and presuppose that the record is qualitatively sound. However, there is serious question of the quality of the evidentiary record in view of significant problems with the consultative examination process - in many instances consultative examinations are factually inadequate and biased in favor of the agency. Such reports are often unrealistically positive, purposefully vague, and often based on perfunctory or extremely brief clinical examinations. They frequently are so standardized as to be suspect,

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46/ There is pending class action litigation challenging the legality of all claims denied at the State agencies under adjudicative criteria which differs from that applied by OHA and the federal courts. Alrich v. Harris, Civil No. 80-279 (D. Vt., filed Dec. 12, 1980).

and are tainted by financial conflicts of interests on the part of the submitting physicians.

Where the State agencies rely on medical evidence which is inherently unreliable, they, obviously, can reach an erroneous conclusion. The ALJs recognize this and, accordingly, their determinations can be quite different from those reached by the State agency. Typically, when there is inadequate or conflicting medical data in the record, claimants may be scheduled to undergo consultative examinations, in accordance with 20 C.F.R. 404.1517 and 20 C.F.R. 416.917. The physicians performing the examinations are under contract with the government and submit reports which become significant probative evidence. In those situations where consultative examinations are unreliable, common sense and requirements of propriety require ALJs to give more weight to credible and equally expert medical evidence from treating physicians or other medical sources, and claimant's own testimony at the hearing. While studies of the consultative examination process have found that is is essential for the full development of the record and is cost effective, it has also been shown that increases in consultative examinations have led to increases in the denial rate. 47/

Recently, the probative value of the consultative examination process has become more suspect, especially in

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47/ See note 23 supra.

volume provider situations. 48/ There has been litigation involving Suburban Internal Medical Group, also known as American Medical Services or Thurman and Thurman, a group of consultative physicians operating in at least nine offices in four states, David W. Bush inter alia v. Schweiker, CCH Unemployment Insurance Reports with Social Security, ¶ 17,993 at 2399-83 (1982). On July 8, 1981, Federal District Court Judge Glen M. Williams remanded seven cases to the Secretary for further proceedings. Judge Williams had found "from the evidence and the sworn deposition of Dr. Harry E. Martin that the reports, practices, medical procedures, methods and cursory medical examinations of Dr. Harry E. Martin, Drs. Thurman and Thurman and Suburban Medical Group are fraudulent in nature and the court so rules that such reports, practices, etc., are a fraud." 49/

The record in the Thurman case documented the superficiality of the examinations and that the reports contained fraudulent misrepresentations. The plaintiffs stated in their brief:

> Dr. Martin sees at least 25 to 35 claimants in one day and completes his reports for all of them on the same day. His notes and some of the test results are turned over to Thurman and Thurman in Nashville, Tennessee. In a little over a week, a five to ten page detailed

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48/ Staff of House Subcommittee on Social Security of the Committee on Ways and Means, 97th Cong., 1st Sess., Volume Providers of Medical Examinations For Social Security Disability Cases (Comm. Print 97-16).

49/ Ibid. p. 5.

> comprehensive report signed 'Dr. Martin by Dr. Thurman' is submitted to the Social Security Administration. This report generally includes a physical capacities evaluation report showing ranges of motion and claimants abilities to perform certain tasks for certain amounts of time. Dr. Martin stated under oath that he does not personally fill out the physical capacities evaluation. The end result of these procedures is that Dr. Martin spends only a short time with the claimants, but a report is prepared that appears to be the result of an extensive and exhaustive examination by Dr. Martin. This misrepresentation of the examination has been relied on repeatedly by the Social Security Administration and the Court to deny benefits to claimants. 50/

The final reports were not completed or approved by the examining physician and, therefore, could not reasonably be relied upon as probative or substantial evidence within the meaning of controlling case law. The plaintiffs' brief stated:

> Dr. Martin has admitted, under oath, in a deposition that he does not see the report or sign the report; the examination takes place in Kingsport, Tennessee, however the report is typed in the offices of Thurman and Thurman in Nashville, Tennessee, and it is forwarded directly to the Disability Determination Services in Roanoke. Dr. Martin further testified that certain aspects of the report are not available to him at the time of the examination, but are forwarded to Nashville, where they are inserted by Dr. Thurman, who signs Dr. Martin's name, and also fills out the physical capacities evaluation form. In addition, Dr. Thurman, by going by a shorthand system, fills out the physical capacities evaluation in Nashville several days after the examination, and backdates the physical capacities evaluation to the date of the examination by Dr. Harry Martin. 51/

50/ Ibid. at p. 5.

51/ Ibid. at p. 6.

The abuses outlined above were not isolated occurrences. Thurman and Thurman have accounted for one third of the total consultative examinations in the State of Tennessee since 1980. The September 1981 Subcommittee Print cited problems with other providers, most notably with Johnson and Byers in Pittsburgh and Dr. Richman Lipman of Miami, Florida, the "father of volume providers." 52/ The problem is not insignificant in terms of funds expended. Thurman and Thurman were paid $827,000 in Tennessee alone in 1980 and, nationally, the expenditures in the CE program amounted to 94.1 million in 1980; in 1981 the estimate is 128.6 million and the projection for 1982 is 145.0 million. 53/

The Comptroller General has addressed the consultative examination problem in at least four reports, and has been critical of SSA managment. 54/ The reports cite the weakness in SSA program administration, including inadequate criteria and guidelines, poor quality input from SSA district offices, and varying case processing procedures as contributing factors. Also noted were the inherent limitations of the Federal/State relationship. The 1979 report of the Comptroller General stated: "We believe program officials have not adequately evaluated their consultative examination needs because they have failed to properly address the adequacy of

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52/ Ibid. at p. 9.

53/ Ibid. at p. 15.

54/ See note 23 supra.

State agency claim development and the quality of the information being purchased." 55/ In an attempt to remedy this situation, Congress passed Public Law 96-265, giving the Secretary greater authority for management of the consultative examination process; as a result, implementing regulations were published on April 21, 1981, and are now contained in 20 C.F.R. 404.1501 *et seq.* and 20 C.F.R. 416.901 *et seq.* The comments to these regulations underscore the scope of the bias of the consultative physicians. The Atlanta Legal Aid Society cited the poor quality and unreliability of some of the physicians used and indicated further:

> ...it has gotten to the point with a few of them that we are trying to keep our own file of the number of times that these people write unrealistically sanguine adverse reports about clients who are later found-usually by ALJ's but sometimes not until the U.S. District Court level-to have been much more seriously ill than the consultant's report indicated. These doctors often go through the same perfunctory examination with patient after patient, taking very little time to check out problems but submitting lengthy form reports whole sections of which can practically be substituted for corresponding sections applicable to other patients . . . These doctors often derive inordinate amounts of their personal income from payments for the preparation of reports for the DDU. This provides very fertile ground for a conflict of interests in which the doctor repeatedly writes what he thinks DDU wants to hear (you don't have to pay) in the reasonable expectation that such reports will be well received and will assure continued DDU business. Of course this type of "medical practice" is much easier than actual patient treatment would be. One also wonders what the quality of a physician can be who cannot attract enough of his own patients to fill the majority of his professional hours. 56/

55/ GAO, *Control Over Medical Examinations Is Necessary for the SSA to Better Determine Disability*, HRD-79-119 (October 9, 1979) at 24.

56/ *See* note 48 *supra*, at 28.

Consultative examinations are appropriate and beneficial, provided that the physicians are truly "independent" in perspective and not slanted in favor of the government. Good reports should be thorough and complete, with objective and detailed clinical findings and diagnostic results. Commentary and conclusions should not be equivocal and purposefully confusing. Reports should also include objective medical assessments of limitations. Of course, the examinations should be performed by skilled and qualified physicians who have special expertise in the area of claimant's disease or impairment. Further, the physicians should not be overly dependent on referrals from the State agencies for the financial viability of their practice.

Determining Residual Functional Capacity - A Problem Area

The quality of the evidentiary record has also been adversely affected by recent developments regarding residual functional capacity determinations. The most important consideration in the disability analysis is functional capacity, and it is ultimately the responsibility of the ALJ at the hearing level (see 20 C.F.R. 404.1546 and 20 C.F.R. 416.946). The exertional and mental demands of claimant's vocationally relevant past work must first be identified, and, if the claimant still possesses the functional capacity to perform at this level despite his impairments, then the analysis stops and the individual is found not disabled (*See* 20 C.F.R. 404.1520(e) and 20 C.F.R. 416.920(e) and 20 C.F.R.

404.1561 and 20 C.F.R. 416.961). However, if the claimant is precluded from performing past work, the remaining abilities or "residual functional capacity" must be ascertained (see 20 C.F.R. 404.1545 and 20 C.F.R. 416.1645). Exertional levels of work activity are defined as sedentary, light, medium, heavy, and very heavy in 20 C.F.R. 404.1567 and 20 C.F.R. 416.967. Sedentary work activity involves lifting a maximum of 10 pounds, occasionally lifting or carrying articles like docket files, ledgers or small tools, and is work which is primarily sedentary, but which can often require periodic standing or walking in carrying out necessary job tasks. Vocational experts generally testify that the performance of sedentary work for at least six hours a day is necessary for an individual to be competitively employed. If an individual is unable to perform the full range of sedentary work activity, then expert vocational evidence is frequently required.

Residual functional capacity is measured in the total number of hours in an 8 hour work day and continuous number of hours that a person can sit, stand, or walk. It is measured in terms of an individual's ability to lift, use his upper extremities for simple grasping, pushing and pulling, and fine manipulating; and the ability to use his lower extremities for repetitive movements as in operating foot controls. Also important is the degree to which a claimant can bend, squat, crawl, climb, or reach above shoulder level. Restriction of activities involving unprotected heights, being around moving machinery, driving automotive equipment, exposure to marked changes in temperature and humidity, and exposure to dust, fumes, or gases can also be critical. Mental residual functional capacity involves the ability to perform the basic work-related functions described in 20 C.F.R. 404.1521 and 20 C.F.R. 404.921, subsections (3), (4), (5), and (6). The best way to determine functional capacity is to evaluate the totality of the record. This would include consideration of medical data and physical capacities evaluations from treating physicians, consultative physicians and other neutral medical sources. The analysis should also include an evaluation of vocational rehabilitation reports, claimant's allegations, his demeanor at the hearing, his pain, the side effects from medication, and daily activities.

Total reliance on State agency review physicians' determinations to justify denial decisions would be folly in view of certain deficiencies enumerated below. Said individuals are employees of the State agencies and can be expected to follow Agency instructions, and they frequently give an unrealistically favorable (i.e., supporting a denial) residual functional capacity assessment. They often do not give individual attention to each case and sometimes do not personally make the evaluation, but, nonetheless, they sign their name to the functional capacity document. 57/ Most importantly, they never see the claimant, much less conduct

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57/ Soc. Sec. Rul. 78-8, at 63.

a medical examination. A State agency review physician is hardly in a position reliably to evaluate a claimant's ability to stand, walk, or move his extremities when he has never actually seen the claimant perform or attempt these activities. On what basis does the "paper doctor" evaluate the impact of claimant's pain on exertional ability? How does he assess the claimant's ability to tolerate stress, when he has not scrutinized the individual's appearance and reaction to various stimuli? Even the Agency has recognized that medical assessments of physical limitations should be reported by a physician who has examined the claimant. See Social Security Ruling 78-8. If the medical assessment of limitations given by the consultative physician is not sufficient to base a denial decision, the State agency review physician might simply raise the level of functional capacity. 58/ More recently, some State agencies refuse to request, from a consultative examiner, a medical assessment of limitations based on the examination made , even though the ALJ has specifically requested such an assessment. 59/ Further, State agency review physicians rarely give support for their opinions as to functional capacity and do not explain the variations between their opinions and those of

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58/ See note 42 *supra*.

59/ See, for example, memorandum from five ALJs assigned to the Oakland, CA, hearing office, OHA, addressed to Regional Chief Administrative Law Judge, Region IX, Stanley S. Sadur, undated.

other physicians contained in the record. 60/ Due process is obviously severely compromised by these practices. The comments of Judge Williams in the Bush case are in point:

> It goes without saying that the completion of the form by a doctor who has not even seen the claimant, and based on nothing more than the cursory notes of another doctor, constitutes an affront to the government, to the court, certainly to the claimant, and to ethical principles in general. Such ridiculousness is compounded by the fact that the medical vocational guidelines, which now govern such disability evaluations, accord great emphasis to the findings contained in a physical capacity evaluation form.

Bush, at 2399-82.

SSA "Policy" vs. Court Precedent

One other SSA policy deserves mention: it concerns the conflict between the applicability of established legal precedent and agency refusal to acquiesce thereto. In a recent meeting of the OHA Policy Council, a representative of SSA's General Counsel's Office stated that ALJs should carry out agency policy and it was suggested that, when an ALJ is faced with a problem of resolving agency policy contrary to a court decision, he should follow SSA policy, since it is a national program. 61/ This kind of suggestion is a complete anathema to the principles of judicial review established in 205(g) of the Social Security Act and the

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60/ Ibid.

61/ Memorandum from Gordon B. Sroufe, Ohio delegate of ALJ Association, to OHA field offices, December 4, 1981, at page 3.

recognized powers given to the three branches of government by the constitution established as far back as Marbury v. Madison, 1 Cr. 137 (1803). It was requested that the General Counsel put in writing the proposition that ALJs do not have to follow court decisions and, not surprisingly, this request was declined. This precedent policy shows a lack of appreciation for the constitutional system of separation of powers itself. Obviously, it also flaunts Section 205(a) of the Social Security Act constraints and the right of judicial review under Section 205(g) of the Act.

The particular type of case to which the present "policy vs. precedent" conflict pertains relates to the termination of benefits under 20 C.F.R. 404.1594 and 20 C.F.R. 416.994. According to Agency policy, termination can be ordered, upon investigation, without showing any medical improvement - indeed medical deterioration can even be present - and without any consideration of the fact that the claimant is, perhaps, years older. Moreover, it is the Agency position that there need be no discussion of the legal correctness of the prior decision to award benefits, much less a showing of clear and specific error in the prior determination. This is a questionable policy and runs counter to the result in Finnegan v. Mathews, 641 F.2d 1340 (9th Cir. 1981), which requires a showing of medical improvement to support a termination of "grandfathered" SSI benefits. See also Patti v. Secretary of HHS (9th Cir., Civil No. 80-5763, Feb. 1982), and Ithaca v. NLRB, 623 F. 2nd 224 (2nd Cir. 1980). Obviously, the Agency has a way to challenge a court's precedent-setting determination - by appeal to a higher court. The Agency must resolutely challenge those court decisions considered inimical to the Government's or public's interest.

CONCLUSION

As we have seen, individuals have substantive statutory rights to social security and health insurance benefits under the Social Security Act. There are also procedural due process rights that attach to these benefits, which are guaranteed by law. Highlights of due process include fundamental fairness, an impartial decisionmaker, reasonable and necessary rules and regulations, a decision based on a sound record and the law, and the decision supported by substantial evidence. Widescale deprivations of due process can result from case explosion, indirect pressure to deny, the threat of management interference with the integrity of ALJs, application of improper standards at the lower levels, and the inappropriate handling of the evidentiary record. Moreover, policies relating to the application of legal precedent and the cessation of entitlement are causing confusion and undermining confidence in the system.

The Social Security "legal System," as noted above, generates a conflict between the ALJs, who decide cases for the programs administered by SSA, and the other components of SSA which process that caseload. This conflict stems from differences in perspective and function between SSA components and the ALJs, who are constrained by law and by practice to decide individual cases under due process of law. The ALJs constitute the only level of SSA (1) where the totality of credibility can and must be taken into account, (2) where reasonable inferences can be drawn from a complete record, (3) where a detailed decision must be justified on a legal basis, with precise reasons provided for the decision, and (4)where the principle of due process is best exemplified.

There is a glut of proposals on the horizon relating to Social Security cases. Elimination of judicial review under § 205(g), and even the elimination of the right to a hearing, have been suggested. Obviously, these ideas are incompatible with due process or the interests of the public. Legislation to create a Social Security Court has been introduced by Congressman J. J. Pickle, chairman of the Subcommittee on Social Security, House Ways and Means Committee, aimed at achieving, among other goals, "adjudicatory uniformity." 62/ Various administrative changes regarding ALJs have, in the past, been contemplated. These include a unifed ALJ corps, placing the ALJs directly in the Office of the Secretary of DHHS, and enhancing OPM supervision of ALJs to the exclusion of the employing agency. Amendments to the APA concerning the method of ALJ appointment have also been proposed. 63/ However, it is clear that the basic thrust of any reform

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62/ H.R. 3865, 97th Cong., 1st Sess. (1981); H.R. 3207, 97th Cong., 1st Sess. (1981); H.R. 5700 97th Cong., 1st Sess. (1981), now pending as H.R. 6181.

H.R. 6768, 96th cong., 2nd Sess. (1980).

must be in the direction of the furtherance of due process. Taking the ALJs out of SSA would be a step in the right direction. The Association believes that, eventually, there should be a Federal Administrative Law Court, to which all ALJs would be assigned, to hear cases relating to all agencies in the Federal Government, with sections therein corresponding with the types of cases heard, e.g., Social Security cases, Mine Health and Safety cases, etc. The ultimate in independence and due process can then be realized.

The crisis is upon us, the time for study has passed; Congress must act if due process is to be preserved in the Social Security context. All Americans are entitled to a better system of Social Security justice - one that is responsive to fiscal, administrative, and legal integrity. The most significant step that can be taken now by the present Congress would be to remove the ALJs organizationally from SSA and place the corps in an independent (i.e., embracing the concept of decisional independence) forum for the handling of all cases requiring evidentiary hearings. Significantly, the Inspector General, in a recent 1981 report, 64/ recommended the elevation of OHA within the DHHS structure, free of the "potential of pressure being exerted upon the ALJs in an effort to influence the decision" and to permit the handling of all DHHS hearings. In support thereof, he concluded:

64/ Office of Inspector General, U.S. Department of Health and Human Services, Management Oversight Review Report on the Office of Hearings and Appeals, Social Security Administration, May 1981.

> All of these reports delve into the organization, management, and operation of the OHA. Yet all are silent on what we see as one of the first issues that needs to be resolved. That question is: 'Where should the OHA be organizationally located?' Currently the OHA is headed by an Associate Commissioner who reports to the Commissioner of the Social Security Administration. OHA is responsible for conducting independent and impartial hearings on appealed determinations involving claims for retirement, survivors disability and health insurance benefits and supplemental security income under Titles II, XVI, and XVII of the Social Security Act. What we have then is one eligibility determination while the OHA arm of Social Security Administration adjudicates that decision. One could question the wisdom of this arrangement since the SSA staff controls the resources, space, equipment and supplies of the OHA which is restricted, could indirectly control the number/quality of hearings held." 65/

The Association believes that reassignment of ALJs from SSA to an independent review commission within DHHS would obviously enhance the appearance of justice. It is evident that any litigant will view with suspicion the decision of a trier of facts paid by and identified closely with the party opposing that individual litigant's concerns. Considering the hostility faced by ALJs within SSA, as demonstrated in the past, it is clear that the creation of, and reassignment of ALJs to, an independent commission within the structure of DHHS, would not only enhance the appearance of justice but, in fact, would promote justice. The ALJs are a hard-working, dedicated corps, chosen by a competitive process from the best of experienced attorneys. It is a waste of that corps' expertise when the system, rather than learning

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65/ Ibid. Findings, p. 16.

from that experienced body, is in actual conflict with it. Reassignment of ALJs would also avoid the institutional difficulties of "enforcing" decisions when SSA disagrees with them, as occasionally occurs. The criminal justice system would not be a healthy one if the police were in charge of the courts. Similarly, the Social Security legal system is not a healthy one because of the constant conflict and friction between those who render the initial ("paper") institutional determinations on disability cases for SSA and those who do so, pursuant to an evidentiary hearing, under the APA, independent of institutional bias and control.

Paul Rosenthal

Paul Rosenthal
U.S. Administrative Law Judge
Immediate Past President,
Association of Administrative
Law Judges

C E R T I F I C A T I O N

I, the undersigned, hereby certify that I am the duly elected Secretary of the Association of Administrative Law Judges in the Department of Health and Human Services, and that the above document (after amendments thereto and now consisting of 51 pages) was duly adopted as the POSITION PAPER of said Association on the 13th day of July, 1982, by unanamous vote of the Officers and Board of Directors.

8/5/82

James A. Vickrey

James A. Vickrey, Secretary
Association of ALJs in HHS

3649 Oakdale Road
Birmingham, Alabama 35223

March 12, 1984

Honorable Howell Heflin
U. S. Senate
Washington, D. C. 20515

Re: S. 1275

Dear Senator Heflin:

As you are aware, I have in the past expressed to you my strong support for your efforts to enact S. 1275 creating an independent ALJ Corps. As an Administrative Law Judge in the Birmingham office of the Office of Hearings & Appeals. I wish to relate to you certain actions which, in my opinion, point up the necessity for this type legislation.

In the last couple of weeks, the ALJ's in the Birmingham field office of the Office of Hearings & Appeals of the Social Security Administration have been stripped of their supervisory authority over their own staff. I am no longer the direct supervisor of my own hearing assistant or my hearing clerk. This authority has been delegated to a hearing office manager. The staff has "primary responsibility" to do my work. The staff that I had assigned to me are good hardworking and loyal government employees. They will continue to the best of their ability to do their jobs but whether I can count on having their services at any time is now subject to the whim of the "hearing office manager" and her superiors. The hearing office manager in Birmingham is a former clerical employee who is a high school dropout (she did get a GED) and who has displayed over the years little managerial or other talent other than to get herself advanced. All areas of responsibility assigned to her prior to this move were ineffectually run. I made the "mistake" of complaining about this on several occasions. Overwhelming office sentiment was opposed to this type move (which was suppose to be voluntary). The ALJ's in the office were not consulted. We were "volunteered" (I now know what a volunteer in the Red Army feels like). I fear this will affect the due process received by the Social Security claimants.

DOCUMENT NO. 8 (2 pages)

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I am unsure what can be done about this situation other than to pray for your efforts on S. 1275. If you or your staff have any questions, please feel free to call me.

Sincerely yours,

Samuel A. Montgomery

cc: Judge Charles Bono

Office 205-254-1543
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98th Congress
1st Session

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THE ROLE OF THE ADMINISTRATIVE LAW JUDGE IN THE TITLE II SOCIAL SECURITY DISABILITY INSURANCE PROGRAM

A REPORT

PREPARED BY THE

SUBCOMMITTEE ON OVERSIGHT OF
GOVERNMENT MANAGEMENT

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

With Best Wishes
Congressman John Paul Hammerschmidt

OCTOBER 1983

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LETTER OF TRANSMITTAL

U.S. Senate,
Subcommittee on Oversight of
Government Management,
Committee on Governmental Affairs,
Washington, D.C., September 16, 1983.

Hon. William V. Roth, Jr.,
Chairman, Committee on Governmental Affairs, Washington, D.C.

Dear Mr. Chairman: The Subcommittee on Oversight of Government Management transmits the following report on the role of the Administrative Law Judge in the Title II Social Security Disability Insurance Program.

On June 8, 1983, the Subcommittee held a hearing to investigate allegations that Administrative Law Judges (ALJs) in the Social Security disability program are subject to improper pressure from the Social Security Administration (SSA) to deny more disability cases at an increasingly faster rate. Also investigated were allegations that the SSA is interfering with the decisional independence and impartiality of its ALJs by incorporating internal agency guidelines, the Program Operation Manual Systems (POMS), into Social Security Rulings (SSRs), thereby making the internal agency guidelines binding on the ALJs; and by utilizing the policy of "non-acquiescence" which prohibits ALJs from giving selected federal court decisions precedential weight in the adjudication of disability claims.

The Subcommittee received testimony from the Social Security Administration, the Association of Administrative Law Judges, Inc., individual ALJs, academic scholars in the fields of administrative and constitutional law, and an attorney representing several disabled claimants in a lawsuit against the SSA.

The Subcommittee's principal finding is that the SSA is pressuring its ALJs to reduce the rate at which they allow disabled persons to participate in or continue to participate in the Social Security disability program. (The SSA has been successful in its efforts as evidenced by recent statistics showing a dramatic decline in the ALJ allowance rate in the past year and a half from 67.2 percent in mid-1982, to 51.9 percent in June 1983.) The Subcommittee also finds that the SSA is imposing this pressure through several means including the inequitable and unjustified targeting of only allowance decisions and high allowance judges for review pursuant to an amendment sponsored by Senator Henry Bellmon and passed in 1980 (Bellmon Review), and the use of minimum production quotas and productivity goals.

The Subcommitee recommends that:

(1) The SSA immediately discontinue all Bellmon Review activity;

(2) The SSA stop all managerial, administrative, and policy-related activity directly or indirectly aimed at influencing the ALJs' allowance rates;

(3) the Judiciary Committees of the House and/or Senate review the propriety and legality of the SSA's actions regarding ALJ productivity.

The Subcommittee recognizes that although there is a need for the Social Security disability adjudicative process to be uniform and efficient, these goals must not override the obligation to ensure that severely disabled persons receive full, fair, and impartial treatment in the appeals process. The recommendations of the Subcommittee are designed to help ensure that the position and authority of one of the vanguards for such fair treatment, the ALJ, is protected.

Sincerely,

WILLIAM S. COHEN,
Chairman.
CARL LEVIN,
Ranking Minority Member.

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I. INTRODUCTION

On June 8, 1983, the Subcommittee on Oversight of Government Management conducted a hearing to examine several issues that had surfaced in the adjudicative process of the Title II, Social Security Disability Insurance Program (SSDI):[1]

(1) Allegations that Administrative Law Judges (ALJs) in the Social Security disability program are subject to improper pressure by the Social Security Administration (SSA) to deny more disability cases and achieve and maintain a specified case disposition rate; and

(2) Allegations that the SSA is interfering with the decisional independence and impartiality of its ALJs by incorporating internal agency guidelines, the Program Operation Manual Systems (POMS), into Social Security Rulings (SSRs), thereby making the internal agency guidelines binding on the ALJs; and by utilizing the policy of "non-acquiescence" which prohibits ALJs from giving selected Federal court decisions precedential weight in the adjudication of disability claims.

Concern for these issues arose as a result of a hearing held by the Subcommittee on May 25, 1982, which investigated actions taken by the SSA in reviewing the continuing eligibility of disabled individuals receiving SSDI benefits. The Subcommittee concluded in a report on that hearing that the benefits of large numbers of severely disabled individuals and their dependents were being unfairly terminated, that major procedural reforms in the review process were needed, and that the independent role of the ALJ in determining disability was critically important and should be preserved.[2]

This is not the first time that allegations about undue pressure on SSA ALJs have been made. As early as 1972, the SSA and its ALJs were having disputes over productivity goals and reversal rates.[3] Throughout the 1970's, there was a steady increase in the number of applications for disability benefits and subsequent requests for ALJ hearings.[4] At the same time, there was a continuing increase in the rate at which ALJs were allowing benefits for claimants who had been denied or terminated at the State level.[5] This increasing disparity between decisions at the State and ALJ levels generated concern among members of Congress about the inconsistencies between the evaluation processes and techniques used at the two levels of adjudication.[6]

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[1] Under Title II of the Social Security Act, workers who suffer severe physical or mental impairments and are unable to work receive disability benefits by way of monthly payments. In order to be eligible for the Title II program, a claimant must have worked for a set number of years and contributed to the program through Social Security payroll tax deductions. 42 U.S.C. § 416 et. seq.: 20 CFR 404.

[2] See Senate Subcommittee on Oversight of Government Management, Committee on Governmental Affairs, "Oversight of the Social Security Administration Disability Reviews," August 24, 1982.

[3] See Report of the United States Congress, House Committee on Ways and Means, Subcommittee on Social Security, "Social Security Administrative Law Judges: Survey and Issue Paper," January 27, 1979, p. 67.

[4] See Committee print of the Committee on Finance, United States Senate, "Staff Data and Materials Related to the Social Security Disability Insurance Program," August 1982, pp. 69–70.

[5] *Supra* fn. 3 at 66. See also Id. at 13.

In response to this concern, Senator Henry Bellmon introduced an amendment which was enacted into law as part of the Social Security Disability Amendments of 1980,[7] which required the SSA to review the decisions of its ALJs.[8] The implementation of that amendment combined with the 1980 statutory requirement that SSDI beneficiaries with non-permanent disabilities undergo "continuing disability investigation" (CDI) reviews at least once every three years,[9] brought the allegations of undue pressure to a crisis.

In implementing the "Bellmon Review," the SSA decided to initially review only the allowance decisions to ALJs with high allowance rates regardless of the potential accuracy or inaccuracy of those decisions.[10] Many of the ALJs viewed this process as a way to target and punish those ALJs who granted a high number of allowances. In addition, although according to the statute the CDIs were not to be implemented until January 1982,[11] the SSA instituted the reviews in March 1981,[12] without adequate preparation. This had two significant consequences to the ALJs. First, in part because of the lack of preparation for the reviews, the sheer volume of cases to be reviewed, and other reasons discussed in the Subcommittee's May 25, 1982, report, thousands of disabled individuals were improperly terminated at the State level. Instead of the predicted termination rate of 20 percent, within the first twelve months of operation, the termination rate at the State level had reached an astonishing 47 percent.[13] The ALJs responded to this development with increasingly higher reversal rates which reached 67.2 percent by mid 1982.[14]

Second, the sheer increase in the number of cases dramatically increased the ALJ workload as appeals of termination decisions grew 86.6 percent, from 226,200 in 1979, to 422,000 in 1983.[15] In response to this crisis, ALJs were urged by the SSA to increase their productivity from 27 case dispositions per month in 1979,[16] to 45 case dispositions per month by September 1983.[17]

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[6] Social Security Disability Amendments of 1980, Disability Amendments, P.L. 96-265, Legislative History, p. 52.

[7] P.L. 96-265, 42 U.S.C. § 1305 (1980).

[8] 42 U.S.C. § 421nt, P.L. 96-265, § 304(g).

[9] 42 U.S.C. § 421, P.L. 96-265, § 311.

[10] "The Bellmon Amendment," Social Security Disability Amendments of 1980, P.L. 96-265, § 304(g) and Implementation of § 304(g) of P.L. 96-265, "Social Security Amendments of 1980, "Report to the Congress by the Secretary of Health and Human Services." Prepared by the Department of Health and Human Services, Social Security Administration, January 1982. Retained in Subcommittee files.

[11] *Supra* fn. 7.

[12] Memorandum dated March 13, 1981, from Fred Schutzwatt, Acting Deputy Commissioner (Operations) to All Regional Commissioners, Social Security Disability Insurance Program, Hearings before the Subcommittee on Oversight of Government Management, Committee on Governmental Affairs, pp. 151.

[13] Contained in SSA's May 17, 1982, response to April 27, 1982, letter from the Subcommittee, May 25, 1982, hearing record, p. 173.

[14] SSA memorandum dated May 14, 1982, from Beverly A. Bedwell, Associate Commissioner of Assessment, to the Commissioner of Social Security, May 25, 1982, hearing record p. 190.

[15] *Supra* fn. 4 at p. 70. The 1983 figure is based on an estimate provided by HHS to plaintiff ALJS in *Association of Administrative Law Judges* v. *Heckler*, CA No. 83-0124 in United States District Court for the District of Columbia, Plaintiffs' Complaint for Declaratory Judgment and Injunctive Relief, p. 7. Retained in Subcommittee files.

[16] *Supra* fn. 4 at 70–72.

[17] "Listing of FY82 (Office of Hearings and Appeals) OHA Initiatives and Objectives," hearing record p. 465.

At the same time, the SSA was also employing two controversial adjudicative policies. First, in what the SSA called an effort to achieve uniformity between the State and ALJ evaluation processes,[18] the SSA began to incorporate POMS into SSRs. POMS, which are internal agency guidelines, are not binding on ALJs; however, by incorporating the POMS into the SSRs, the SSA gives them the *de facto* force and effect of law and makes them binding upon ALJs. This has been viewed as a questionable practice because POMS are not subject to public or congressional review or comment and have differed from Federal regulations and statutes creating inconsistencies between internal SSA policy and SSA regulations.

Second, the SSA employs a policy called "non-acquiescence,"[19] which prohibits agency personnel, including ALJs, from following certain Federal court decisions except in the case in which the decision was rendered. This strips the decisions of their precedential weight and value.[20] Apart from being constitutionally questionable, this policy also presents a very serious problem for the ALJs. In a case where the SSA has chosen to non-acquiesce, the ALJ must decide whether to follow the court or the agency, although he or she has a responsibility to try to follow both, and is put in the position of "trying to serve two masters."[21]

Unable to ignore these very serious problems in the system and having received a growing number of complaints from ALJs and evidence of the SSA's controversial managerial and administrative activities, the Subcommittee concluded that there was a pressing need to investigate the ALJs' allegation and the agency's adjudicative policies and practices.

The following witnesses appeared at the hearing:

Louis B. Hays, Associate Commissioner for Hearings and Appeals and Acting Director to the Deputy Commissioner for Programs and Policy, Social Security Administration;

Donald A. Gonya, Assistant General Counsel, Social Security Division, Office of General Counsel, Health and Human Services Department;

Irwin A. Friedenberg, Deputy Chief Administrative Law Judge, Office of Hearings and Appeals, Social Security Administration;

Charles N. Bono, President, Association of Administrative Law Judges, Inc.;

Jacob Friedes, retired Administrative Law Judge, Buffalo, New York;

Victor G. Rosenblum, professor of administrative law, Northwestern University School of Law, Chicago, Illinois;

Elena Ackel, Legal Aid Foundation of Los Angeles, California, Attorney for Plaintiffs in *Lopez* v. *Heckler*; and

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[18] Memorandum dated January 7, 1982, from the Associate Commissioner of Hearings and Appeals to All Administrative Law Judges, hearing record p. 216.

[19] The exact date when this policy was first used is unknown; however, the SSA first *formally* employed the policy in 1969, when the SSA issued its first formal "ruling of non-acquiescence" regarding the case of *Rasmussen*, v. *Gardner*, 374 F.2d 589 (10th Cir. 1967). Prior to *Rasmussen*, SSA may have employed the policy without issuing a formal ruling, but without formal rulings there is no way to establish when the policy was first used.

[20] Under the legal doctrine of *stare decisis*, the rule in a case creates binding precedence for all subsequent litigants disputing the same issue.

[21] *Hillhouse* v. *Harris*, 547 F. Supp. 88, 93 (1982).

Paul Bender, professor of constitutional law, University of Pennsylvania Law School, Philadelphia, Pennsylvania.

In addition to the statements and testimony received from these witnesses, the Subcommittee also received written statements, telephone calls, letters, and other documents from Administrative Law Judges, attorneys, disability claimants, SSA state disability examiners and various organizations representing the disabled.

II. BACKGROUND

A. THE SSDI EVALUATION PROCESS

In order to fully understand the role of the ALJ in the disability program, it is important to understand the context within which the ALJ functions.

The SSDI evaluation process involves two levels of government: the State level and the Federal level.[22] Pursuant to Federal-State agreements, the administration of the SSDI program is contracted out to State agencies. The State agencies have two primary functions: to secure medical and vocational information necessary to determine eligibility or continuing eligibility, and then to determine a disabled individual meets the Federal criteria for establishing eligibility.

The State disability determination service (DDS) requests medical records from the claimant's medical treaters and medical facilities. The DDS may also request that the claimant undergo a consultative examination and tests if additional medical information is needed. Based on all the medical information received from these various sources, a disability examiner, along with a DDS staff physician, makes the determination as to whether an individual is sufficiently medically disabled to qualify or to continue to qualify for benefits.

Although the State agencies administer the program, the DDS decisions are issued as that of the SSA, and the program is operated under the guidelines and auspices of the SSA. If a claimant is denied participation by the DDS, he or she has a right to file for reconsideration. At this point, the claimant may submit additional evidence. This reconsideration evaluation process is also performed by the DDS and is very similar to the initial evaluation process. If after being evaluated at the Statel level an individual is not satisfied with the result (received a denial or termination decision), a claimant may then seek recourse at the Federal level.

The first step at the Federal level is the ALJ hearing. The ALJ hearing is a *de novo* proceeding wherein a claimant may submit additional evidence, produce expert and lay witnesses and be represented by counsel. While the hearings are official judicial proceedings, they are not covered by the technical rules of civil procedure.

There is one step in the administrative process beyond the ALJ hearing at the Federal level and that is the Appeals Council. The Appeals Council is the court of last resort in the SSA's administrative process. The Appeals Council is empowered to review the ALJ's decision at its own discretion (using the criteria set out in regulations and referred to as review or "own-motion"),[23] at the request of the State disability office, or at the request of the claimant and may affirm, reverse or remand an ALJ's decision. A claimant has exhausted his or her administrative remedy after having appealed to the Appeals Council. If after the Appeals Council has rendered its decision a claimant is still not satisfied, he or she may seek recourse in the Federal courts.

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[22] 42 U.S.C. § § 1381–1383; and Title II of Social Security Act, 42 U.S.C. § 401 et seq.; 20 C.F.R. 404.

B. The Administrative Law Judge

In 1946, recognizing a need to provide greater protection to the due process rights of persons subject to agency adjudication, Congress passed the Administrative Procedures Act (APA).[24] Prior to the passage of the APA, any designated agency employee could preside over adjudicative hearings involving the determination of an individual's rights. Thus, there was no mandatory separation between the prosecutorial and adjudicative functions of an agency. However, with the enactment of the APA, the office of the "hearing examiner" was created. [25] The APA separated the office of the hearing examiner from the agency by assigning the responsibility for the hearing examiners' selection, tenure, and compensation to the Civil Service Commission. As of January 1, 1979, the name of the Commission was changed to the Office of Personnel Management (OPM).[26] In 1972, the title of the hearing examiner was changed to "Administrative Law Judge." [27]

It is very difficult to become an ALJ. In order to qualify, a candidate must have at least seven years of legal experience, meet high standards of professional integrity and responsibility, and must enjoy a good professional and personal reputation among his or her peers.

A candidate must undergo an examination process, wherein he or she is evaluated under a 100-point rating system. Sixty of the 100 points are based on an oral and written examination, and pertain to legal skills and professional experience; 40 points are based on a peer review process. A candidate must achieve a final score of at least 80 points to be eligible.[28]

The stringency of the examination process is exemplified by the fact that in recent years the acceptance rate has been only 28 per cent.[29] However, even successful completion of the examination process does not automatically make a candidate an ALJ. In order to become an ALJ, a registered candidate must be selected by an agency which may choose an ALJ from only the top three candidates on the register.[30]

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[23] Pursuant to 20 C.F.R. 404.970:

(a) The Appeals Council will review a case if—

(1) There appears to be an abuse of discretion by the administrative law judge;

(2) There is an error of law;

(3) The action, findings, or conclusions of the administrative law judge are not supported by substantial evidence; or

(4) There is a broad policy or procedural issue that may affect the general public interest.

(b) If new and material evidence is submitted with the request for review, the Appeals Council shall evaluate the entire record. It will then review the case if it finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently on record.

[24] Presently codified at 5 U.S.C. § 551 *et seq.*

[25] 60 Stat. 237, 244 (1946).

[26] P.L. 95–454, Title II, §§ 201(c)(2), 202(d), October 13, 1978.

[27] 37 *Fed. Reg.* 16,787 (1972) and P.L. 95–251, March 27, 1978.

[28] U.S. Office of Personnel Management, Announcement No. 318, "Administrative Law Judge (ALJ)." Effective March 31, 1983. Retained in Subcommittee files.

[29] Report of the Congressional Research Service, Library of Congress, "The Administrative Law Judge System," prepared by Floyd Lewis, Legislative Attorney, American Law Division, September 9, 1982, pp. 15–16. Retained in Subcommittee files.

Although an ALJ is an employee of the selecting agency, he or she must remain fair and impartial and be free to exercise his or her judicial authority.[31] Thus the APA requires that ALJs:

(1) are compensated solely in accordance with the determination of the OPM;

(2) are not subject to the supervision of or performance ratings by any person having investigative or prosecutorial roles in the agency;

(3) are prohibited from engaging in an *ex parte* communication with any interested persons inside or outside the agency regarding matters relevant to the merits of a proceeding;

(4) are not to perform duties inconsistent with their responsibilities; and

(5) are, whenever possible, to be assigned cases on a rotation basis.[32]

The APA further restricts the authority that an agency has over an ALJ by setting narrow parameters for removal. In order to remove an ALJ, an agency must establish, pursuant to providing the ALJ with an opportunity for a hearing before the Merit Systems Protection Board (MSPB), that "good cause" exists for removal.[33] In the past, "good cause" has been interpreted to mean:

(1) physical disability;

(2) financial problems, which impair job efficiency;

(3) conduct either "on or off the bench" which violates the canons of judicial conduct; or

(4) reductions in work force because of fiscal reasons.[34]

The duties of an ALJ are two-fold: factfinder and decisionmaker. In conjunction with these duties, an ALJ is given much of the same judicial functionary authority as that of other Federal judges. An ALJ may, for example, administer oaths, issue subpoenas, rule upon offers of proof, receive relevant evidence, question witnesses, determine credibility, and make findings of facts and conclusions of law and decisions on the basis of reliable, probative and substantial evidence.[35]

There are currently 1,156 ALJs employed by the Federal Government,[36] of which 810, or 70 percent, are employed by the SSA.[37]

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[30] *Supra* fn. 28.

[31] 5 U.S.C. § 556(b) (1956).

[32] 5 U.S.C. §§ 557(d)(1), 3105, 5335(a)(3)(B).

[33] 5 U.S.C. 7521 (1978).

[34] Jules Gruff, Jacob A. Stein and Basil J. Mezines, *Administrative Law*, Vol. 1, Chapter 6, Supplement Prepared by George Bearese, William Hurd, Jeremiah J. Spires and Claire Pickens (1977); *Benton* v. *United States*, 488 F.2d 1017 (C&CL 1973); *McEachern* v. *Macy*, 233 F. Supp. 516 (W.D.S.C. 1964), affirmed 341 F.2d 895 (4th Cir. 1965); *Hasson* v. *Hampton*, 34 Pike and Fischer, Ad. L 2d 819 (D.D.C. 1973); and *Ramspeck* v. *Federal Trial Examiners Conf.*, 345 U.S. 128, 73 S. Ct. 570 (1953).

[35] 5 U.S.C. 566(c) (1976).

[36] *Supra* fn. 29 at 12.

[37] "Office of Hearings and Appeals Full Time Permanent Staff on Duty End of Year," May 25, 1982, Subcommittee hearing record, p. 168.

C. THE ROLE OF THE ADMINISTRATIVE LAW JUDGE IN THE TITLE II SOCIAL SECURITY DISABILITY INSURANCE PROGRAM

Within the context of an SSDI administrative proceeding, the ALJ occupies a very unique and significant role for several reasons. First, until recently, the ALJ was the first agency personnel in the review process who had an opportunity to interview the claimant in person. Thus, the ALJ was the only agency official able to visually assess the "human element" in a case.[38]

Second, although the hearing is an official judicial proceeding, it is a non-adversarial proceeding (the SSA is not represented at the hearing), and the ALJ is afforded a great deal of procedural latitude. The ALJ has the authority to request additional testimony of medical and vocational experts and lay witnesses, and receive firsthand information and explanations on issues relevant to the claimant's condition or case.[39] Finally, the ALJ has the responsibility of making a decision based on the hearing record developed throughout the proceedings. If accepted by the agency and not appealed to the Appeals Council, this decision becomes the final decision of the agency.[40] Therefore, in the adjudicative process, the ALJ plays a key role because he or she has the opportunity to define the issues, collect and structure the evidence, justify the decision, and propose the administrative remedy.

D. INCONSISTENCIES BETWEEN LEVELS OF EVALUATION

As indicated earlier, there are significant differences between the State disability examination process and the ALJ adjudicative process. These differences fall into two categories; (1) the type, quantity and quality of information available to form the basis for disability determinations; (2) the guidelines governing the interpretation and evaluation of the information gathered.

The State disability examiners must make their determination based only upon written reports, while the ALJs have the benefit of firsthand testimony from the claimant and various medical and vocational experts and lay witnesses. While State disability examiners are bound by the POMS and, therefore, are required to adhere to and implement agency policy which may in fact be more stringent than Federal regulations,[41] ALJs are not found by the POMS but are required to apply the law as defined by the Federal courts, statutes, regulations, and the the SSRs.[42]

In describing these discrepancies, the SSA indicated in its report on the results of the Bellmon Review that:

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[38] As of October 1982, the SSA began to provide a personal interview in the local SSA district offices for beneficiaries subject to CDI reviews. This is for the purpose of explaining to the beneficiary the nature of the CDI process and the responsibility he or she faces in order to maintain eligibility. Also, in legislation passed on January 12, 1983, P.L. 97–455, the SSA is required to establish procedures for a face-to-face evidentiary hearing at reconsideration by January 1, 1984. This will be discussed later in the report.

[39] 20 C.F.R. §§ 404.944, 404.946, 404.948, 404.949, 404.950 and OHA Handbook, Section A–142, 143.

[40] 5 U.S.C. 557(b) (1976).

[41] See Section III, C, 1. infra.

[42] *Supra* fn. 10.

> An examination of the standards and procedures governing the ALJs and DDS indicate distinct differences. In certain instances, operational definitions were not identical. In other instances, ALJ procedures permitted a finding of disability that was not possible under the DDS standards. Finally, in some areas the definitions contained in the standards are the same but procedures differ for evaluating evidence of impairment.[43]

The most significant and obvious consequence of these inconsistencies is the differences in the outcome of cases as evaluated at the two levels. If a claim is denied at the State level and subsequently appealed, it currently stands more than a 50 percent chance of being allowed at the ALJ level.[44] In the three years prior to 1982, the ALJ allowance rate (the term used for the rate at which the ALJs allow cases which State disability examiners deny) [45] steadily increased. In 1979, the allowance rate was 59.5 percent,[46] and by mid-1982, it peaked at 67.2 percent.[47] However, by late 1982, the allowance rate began to decline where it currently stands at 51.9 percent.[48]

The most distressing aspect of this problem is that the claimant is caught in the middle, or as characterized by Senator Levin:

> There is something wrong with a system where the decisionmakers, when presented with the same facts, generate contradictory decisions, where the State disability offices are doing one thing and the ALJs are doing another, where the outcome of your case often rests more upon the stage in which your case is being evaluated, rather than your actual medical condition and ability to work.[49]

The SSA has focused its concern for the adjudicative inconsistencies on the role played by the ALJs. Many Members of Congress, on the other hand, have been more concerned with the overall lack of uniformity in the program and desire to ensure that the outcome of a case is based solely upon the nature and extent of the claimant's condition, rather than the level at which a claim is evaluated.

In 1980, Senator Henry Bellmon sponsored an amendment to the Social Security Disability Amendments of that year which provided the following:

> (g) The Secretary of Health and Human Services shall implement a program of reviewing, on his own motion, *decisions* rendered by administrative law judges as a result of

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[43] *Supra* fn. 10, "Executive Summary" at ii.

[44] In the ten-year period between 1972 and 1982, the ALJ reversal rate increased almost 75 percent from approximately 40 percent to nearly 70 percent. Thus, there was increasing disparity between the outcome of cases adjudicated at the state and ALJ level. However, in the last year and a half the ALJ reversal (allowance) rate declined, and as of the end of the third quarter for FY83, the ALJ allowance rate was 51.9 percent.

[45] It is synonymous with the term "reversal rate," or the rate at which ALJs reverse decisions of state disability examiners.

[46] *Supra* fn. 4 at 57.

[47] *Supra* fn. 14.

[48] Based on information obtained from the National Office of Hearings and Appeals, as of June 1983. Documentation retained in Subcommittee files.

[49] Hearing record p. 5.

> hearings under section 221(d) of the Social Security Act, and shall report to the Congress by January 1, 1982, on his progress. [Emphasis added.]

There is very little legislative history on the Bellmon Amendment. It was offered as an unprinted floor amendment by Senator Long on behalf of Senator Bellmon, who simply introduced the amendment and submitted the written statement of Senator Bellmon for the record. The amendment was accepted by the Senate without debate.

According to Senator Bellmon's statement, the SSA was to review the allowance decisions of those ALJs with high allowance rates.[50] In addition, as passed by the Senate, the amendment not only required the Secretary of Health and Human Services (HHS), to report to Congress on the progress of the program, but outlined what was to be considered and included in the report:

> In his report [the Secretary] must indicate the percentage of decisions being reviewed and describe the criteria for selecting decisions to be reviewed and the reversal rate for individual administrative law judges by the Secretary (through the Appeals Council or otherwise), and the reversal rate of State agency determinations by individual administrative law judges.[51]

However, when the amendment was taken up for review by the Conference Committee, the Committee struck all language specifying what was to be included in the report to Congress. Thus, *the Conference Committee struck all references to the assessment and evaluation of the ALJ reversal rate* and simply required that the SSA review ALJ decisions and report on that review.[52] There was no mention in the amendment itself or the legislative history (but for the introductory statement of Senator Bellmon) that the SSA should focus on allowance decisions or target only ALJs with high allowance rates. Nevertheless, the SSA has repeatedly insisted that it was the intent of Congress to focus the review on only ALJ allowance decisions of those judges with the highest allowance rates.[53]

The Subcommittee requested that the SSA provide documentary evidence and support for its interpretation of the legislative intent behind the Bellmon Amendment. The Subcommittee received from the SSA only a copy of Senator Bellmon's statement which has already been discussed. Thus, in formulating its interpretation of the legislative intent regarding the Bellmon Amendment, the SSA ignored the language of the amendment itself and the changes made by the Conference Committee when it reviewed the amendment.

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[50] United States Congressional Record, December 13, 1980; S. 119, 120, January 31, 1981.

[51] *Supra* fn. 6 at p. 51.

[52] Id.

[53] See the testimony of Louis B. Hays before the House Way and Means Committee, Subcommittee on Social Security, October 23 and 28, 1981, Hearing Record, p. 3; *supra* fn. 12, Executive Summary at 1; Memorandum dated September 24, 1982, from Associate Commissioner, Office of Hearing and Appeals, Louis B. Hays, to all ALJs entitled "Description of the Bellmon Own-Motion Review Program—INFORMATION." Retained in Subcommittee files; *Association of Administrative Law Judges, Inc., v. Schweiker, supra.* Memorandum of Points and Authorities in Support of Motion to Dismiss by Defendants Schweiker, Svahn, Hays and Brown at pp. 5–6, and HHS Defendants' Statement of Material Fact As To Which There Is No Genuine Issue. Hearing record, p. 451.

III. THE SOCIAL SECURITY ADMINISTRATION'S RESPONSE AND POLICY

A. Managerial Focus on the ALJ Allowance Rate

Implementing its misperception of what Congress required under the Bellmon Amendment, the SSA devised a review program which focused primarily upon ALJs with high allowance rates. According to the Bellmon Report, the Bellmon Review was divided into two stages: (1) the "initial review" and (2) the "ongoing review."

The initial review consisted of 3,600 ALJ allowance and denial decisions, which were reviewed by two different units in the SSA: the Office of Assessment, which followed the standards governing the DDS, and the Appeals Council, which applied the standards governing ALJ decisions. The units made new decisions without knowledge of the original ALJ decisions or the decision of any other reviewing body. These decisions were used only for analytical purposes and did not change the original ALJ decision.

The major finding of the initial review was that significantly different decisions resulted even though decisionmakers were given the same evidence on the same case. While ALJs allowed 64 percent of the cases, applying ALJ's standards, the Appeals Council allowed 48 percent, using the same standards and the Office of Assessment, applying DDS standards, allowed 13 percent of the cases. Most significantly, however, the review indicated that the personal appearance of the claimants had a significant impact on the ALJ decisions. Thus, the report on the initial review confirmed the hypothesis that inasmuch as there were "distinct differences" between the standards and procedures governing the ALJ and the DDS, the decisions rendered by the ALJs were not wrong, but just different, based on different criteria, and evaluated with different procedures.

Despite these findings, the SSA decided to focus its "ongoing review," initiated on October 1, 1981, on ALJs and hearing offices with the highest allowance rates, and review only the allowance decisions of these judges. This initial effort was intended to cover 7½ percent of all ALJ SSI[54] and SSDI allowance decisions. The SSA conducted this review with the stated intent of "*bringing about more accurate and consistent decisions by all administrative law judges.*"[55]

The SSA's justification for this practice of focusing on only the allowance decisions of only high allowance judges is two-fold. First, the SSA says that it was mandated to do so by the Bellmon Amendment, which it was not. Second, the SSA says that as a result of the initial review conducted as part of the Bellmon Review, the SSA determined that allowance decisions of high allowance judges are more prone to error than allowance decisions of low allowance judges.[56] The standard for determining error was the rate at which the Appeals Council takes action (which may include remand but not necessarily reversal) on an ALJ decision.[57] Senator Cohen, in his questions to the SSA at the hearing, pointed out the problem with using the Appeals Council action as the yardstick for error.

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[54] The Supplemental Security Income program (SSI) (42 U.S.C. § 1382) provides financial assistance to the needy aged, blind and disabled without regard to their previous work experience.

[55] *Supra*, fn. 10.

[56] SSA post hearing responses to the Subcommittee's additional inquiries, hearing record p. 258; and memorandum entitled "Description of the Bellmon Own-Motion Review Program—INFORMATION," dated September 24, 1982, from the Associate Commissioner, Office of Hearings and Appeals, Louis B. Hays, to all ALJs, hearing record p. 204.

> Senator COHEN. But it may not be an error. In other words, it may not be an error as far as the ALJ is concerned. He made a decision. The Council decides to review it, and it may reaffirm it. That doesn't determine whether it's right.[58]

But the standard for error aside, what became clear at the hearing through the questions of Senator Cohen and Senator Levin was that the SSA did not attempt to determine the error rate for denial decisions as it had for allowance decisions. During Senator Cohen's questioning of Mr. Hays on this issue, the following exchange occurred:

> Mr. HAYS. I'm sorry, sir, but what I tried to explain was that what we are having difficulty in collecting from the antiquated computer system is information on what happens with an individual administrative law judge's denial decision that is being reviewed by the Appeals Council.
>
> Cumulatively, we have the data as to what happens before the Appeals Council with all of the cases that come before it.
>
> Senator COHEN. So you don't have the records as far as what happens to a case when disability has been denied? But you do have the information on those in which disability has been granted and the Council then exercises on its own motion a review of the 15 per cent of allowances; you do have that information?
>
> Mr. HAYS. What I do not have is the individual percentages for each administrative law judge of how many of their denial decisions are in fact taken by the Appeals Council. That is what I do not have.[59]

A little later in the hearing, Senator Levin emphasized the same point in his questioning of Mr. Hays.

> Senator LEVIN. . . . A number of times you weren't quite clear in your testimony this morning. In response to a number of questions you would just simply say 'there's a higher probability of error in the decisions of ALJs with high overall allowance rates.' You didn't mean that. You meant what your written testimony says, I gather? That is, your information indicates that there is a higher probability of error in the favorable decisions of ALJs with higher overall allowances rates, because your antiquated equipment hasn't been able to tell us about the probability of error in unfavorable decisions of ALJs. Is that correct?
>
> Mr. HAYS. What this statement says, and I believe what I testified to verbally, was that both the Bellmon study that is referred to on page 3 of my statement and the ongoing Bellmon own-motion review have indicated that administrative law judges with unusually high allowance rates do have a greater likelihood of error in those allowance decisions.

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[57] Id.
[58] Hearing record, p. 29.
[59] Hearing record, p. 28.

> Senator LEVIN. Only in the favorable decisions. That's what you said on page 3, right?
>
> Mr. HAYS. Yes, that's right.
>
> Senator LEVIN. Your antiquated equipment has not yet been able to tell us whether that's true of what you would call their unfavorable decisions or denials.
>
> Mr. HAYS. With respect to an individual administrative law judge, that is unfortunately the case.
>
> Senator LEVIN. It's unfortunate that your antiquated equipment could analyze judge-by-judge who has a higher error rate relative to what you call the favorable decisions, or the allowances, but your same antiquated equipment can't give us a judge-by-judge analysis relative to the denial of ALJs.[60]

The SSA, at the time it initiated the ongoing review, did not have the full picture of ALJ decisionmaking; its information was limited to only allowance decisions. And yet it established its selection process for ALJs to be reviewed based on this incomplete data base. In response to Senator Levin's inquiry as to why the SSA did not have comparable statistics on ALJ denial decisions, Mr. Hays responded that he had to be able to get the information on allowance decisions to comply with the Bellmon Amendment.[61] The Subcommittee disagrees with this rationale in light of the earlier discussion on the legislative history of the Bellmon Amendment.

Moreover, Mr. Hays admitted at the hearing that review solely of the ALJ allowance rate reveals very little. The full discussion on that point was as follows:

> Mr. LEVIN. . . . Do you consider that a trend to a lower reversal rate—which means more denials—we've established that at the beginning of our questions—to be a more favorable trend?
>
> Mr. HAYS. It could be a favorable trend.
>
> Senator LEVIN. Could it be an unfavorable trend?
>
> Mr. HAYS. I suppose it could be.
>
> Senator LEVIN. We don't know whether it's favorable or unfavorable. It may or may not be in and of itself. We can't determine that it's a favorable trend; would you agree with that?
>
> Mr. HAYS. I think it depends on the quality and accuracy of those decisions. If those decisions that go into an increasing or decreasing allowance rate are accurate, correct decisions, then it's a good trend. If the decisions are not accurate and of good quality, then it's a bad trend.
>
> Senator LEVIN. So, in and of itself, the trend to lower reversal rates, which means more denials by ALJs, is not a favorable trend; you'd have to look behind it.
>
> Mr. HAYS. Looking solely at an allowance rate tells you very little.[62]

Further, the high allowance ALJ selected for the ongoing review in October, 1981, had not been reviewed on an individual basis for their so-called error rates.[63] The ongoing review included in its sweep all high allowance judges regardless of the rate at which the Appeals Council took action on the individual ALJs' decisions. The selection process was thereby prejudicial and has served to undermine an impartial system of justice.

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[60] Hearing record, p. 31.
[61] Hearing record, p. 32.
[62] Hearing record, pp. 34, 35.

Included in the initial ongoing review were 110 ALJs.[64] Forty-six of these ALJ were removed from the review when the SSA changed its selection policy to reflect the own-motion rate of the ALJs instead of the allowance rate.[65] This occurred in April 1982, when the ongoing review was restructured to include 15 percent of the ALJ allowance decisions and to change the method of selection for individual ALJs.[66] Individual ALJs were to be selected (and currently are selected) for review based not on their allowance rate, but on their so-called error rate or own-motion rate (the frequency with which the Appeals Council takes action on an ALJ decision). Three other groups were also added: a national random sample of all ALJ allowance decisions, all the allowance decisions of new ALJs, and ALJ decisions protested by disability examiners in the SSA's Office of Disability Operation.[67]

While individual ALJs are no longer to be selected for review based on their allowance rate, those ALJs already on review for their allowance rate will remain under review until their own-motion rate equals the average of the random sample.[68] And, allowance decisions are still the only decisions reviewed in all four categories.[69]

When asked by the Subcommittee to describe the effects of the Bellmon Review on ALJs subject to such review, Charles Bono, President of the Association of Administrative Law Judges, Inc., an organization which represents over 65 percent of the SSA ALJs,[70] said:

> . . . Being advised that you have been selected for Bellmon review on the basis of your allowance rate is obviously objectionable. It communicates the charge to the judge that something is wrong with his or her rate of allowance. Additionally, the Associate Commissioner has, in the past, indicated they have found the high allowance judges' decisions are more decisionally defective. Therefore, being selected on that basis also communicates to the judge that his decisional product is more defective than others. Being a "targeted judge" is in many respects an unfavorable reflection on the judge, and he is certain to feel prejudiced by it.
>
> Additionally, the management of his cases by the agency is different than those of non-Bellmon study judges. He is under 100 percent scrutiny and all of his cases are subject to pre-effectuation review. Judges who are not under the Bellmon study have no such pre-effectuation review. The result

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[63] SSA post hearing responses to the Subcommittee's additional inquiries, hearing record, pp. 255, 256, 257.

[64] SSA pre-hearing responses to the Subcommittee's inquiries, hearing record, p. 163.

[65] Id.

[66] Memorandum entitled "Implementation of the Feedback Process in OHA's Ongoing Bellmon Review—INFORMATION," dated October 4, 1982, from the Associate Commissioner, Office of Hearings and Appeals, Louis B. Hays, to Regional Chief ALJs, hearing record, p. 200.

[67] *Supra* fn. 56.

[68] SSA's post-hearing responses to the Subcommittee's additional inquiries, hearing record, p. 248.

[69] *Supra* fn. 56.

[70] Information provided by Administrative Law Judge Charles Bono, President of the Association of Administrative Law Judges, Inc.

> is that the claimants who come before the "targeted Judge" are not afforded as speedy a decision effectuation as those who come before a non-targeted judge.
>
> This disparate treatment of one class of judges, as compared to another, deprives the claimants who appear before them of the equal protections and immunities of the law, and due process.
>
> This realization is predictably resulting in pressures on the "targeted" ALJs to do whatever they can to remove themselves from this special scrutiny.
>
> A basic objection is that under this system the agency has established a method to rate and evaluate the general performance of an administrative law judge, which practice is contrary to the provisions of the Administrative Procedures Act. At the same time such a rating and evaluation of non-targeted judges is not happening. The message is clearly conveyed that if a judge is selected for Bellmon review, he has every reason to believe that certain standards and criteria are being applied to his work product by the agency, while others escape such pressures.[71]

In addition to the bias in the selection process for Bellmon Review, the SSA emphasizes its concern over the ALJ allowance rate in a number of other ways. The SSA keeps statistics on each individual ALJ's allowance rate. Lists of the ALJs by region, ranked according to allowance rate, are circulated to the field offices.[72] While, according to the SSA, the official circulation of these lists is intended to be limited to those in supervisory positions,[73] they are nonetheless a statement of agency preference in ALJ performance.

The SSA's preoccupation with lowering the ALJ allowance rate (i.e., reversal rates) has been evidenced in numerous memoranda.

In a memorandum entitled "Individual Reversal Rates," from Ralph F. Ives, Jr., the then-Acting Director of the Office of Management Coordination, to Louis Hays, Mr. Ives made the following statement:

> . . . What we would like to see is a decrease in the variance in ALJ reversal rates *as well as a shift to lower reversal rates indicating more uniformity within the SSA process.*
>
> . . . The results in the second quarter of FY 1982 were much more favorable. While there was not a decrease in the variance among reversal rates the general trend was to *lower reversal rates*. . . . [Emphasis added.] [74]

In a memorandum entitled "FY81 Workload and Comparison to FY80," dated December 16, 1981, from Louis Hays to all ALJs, the following statement was made:

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[71] A letter dated June 16, 1983, from Administrative Law Judge Charles Bono to the Subcommittee. Retained in Subcommittee files.

[72] Retained in Subcommittee files; see also SSA's post-hearing responses to the Subcommittee's additional inquiries, hearing record, p. 246.

[73] SSA's post-hearing responses to the Subcommittee's additional inquiries, hearing record, p. 246.

[74] Hearing record, pp. 33, 35.

> . . . The average allowance rate based on total dispositions declined from 55.8 percent to 55.2 percent. The average allowance rate based on decisions declined from 61.8 percent to 61.3 percent. *This represents the first decline in the annual allowance rate since fiscal year 1974. . . .* [Emphasis added.] [75]

And in a memo from the Director of the Office of Appraisal to Louis Hays, entitled "Production Among Bellmon Targeted ALJs; Processing Time and Pending Case Data of OHs With At Least Two Targeted ALJs," dated June 9, 1982, the following observations were noted:

> . . . Comparative Production/Reversal Rate Data: The chart below provides an "at-a-glance" comparison of monthly production statistics from two pre-Bellmon periods (April 1981 and July 1981) and three Bellmon periods for the original 66 targeted ALJs.

Month	Total dispositions	Number of reversals	Reversal rate (percent)
April 1981	1,896	1,393	74
July 1981	2,004	1,430	71
October 1981	1,972	1,380	70
January 1982	1,598	998	63
March 1981	1,939	1,243	64

> Although total dispositions for January were significantly below the totals shown for the other months, by March, total production from this group was 97 percent of the 2,004 dispositions issued during July 1981. By contrast, the reversal rate in March was percent lower than in July. *Also, we believe it is significant to note that this group of ALJs produced more dispositions in March 1982 than they did in April 1981, with a reversal rate drop of 10 percent. . . .* [Emphasis added.] [76]

The SSA also attempts to make new ALJs conscious of their allowance rates by encouraging a restrictive view in evaluating cases. When an ALJ is hired by the SSA he or she must undergo an initial training program designed to educate the new ALJ on how to properly evaluate and decide cases. These training sessions take six weeks, and during these sessions, the new ALJs evaluate hypothetical cases and do mock hearings. In preparing for the hearing, the Subcommittee questioned Joyce Krutick Barlow, a new ALJ, about her experience in the training program. Responding to the Subcommittee's inquiry, Judge Barlow stated:

> . . . On my second day as an administrative law judge, my "class" was addressed by Rhoda Greenberg, then Director of the Office of Disability Programs. In her remarks, she informed us that the State agencies were correct 95 percent

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[75] Hearing record, p. 224.
[76] Hearing record, p. 214.

> of the time. I, along with many other Judges felt that this was, in effect, a statement that most claims deserved to be denied. . . . Throughout the orientation session, the lecturers, while imparting their vast knowledge of the law and regulations . . . argued with us in mock cases, *attempting to convince us that they* [*the hypothetical claims*] *should not be granted.* . . . [Emphasis added.][77]

In addition, as stated earlier, new ALJs are also placed on Bellmon Review until their decisions are "satisfactory" or "roughly equal to or lower than the average own-motion rate as determined by the national random sample portion of the Bellmon Review."[78]

Finally, the Subcommittee is also concerned that in the past two and one-half years, the SSA has conducted more than 30 studies and reviews on the ALJs allowance rates, productivity and decisional quality.[79] This is in striking contrast to the years prior to 1980, when according to the SSA's own information, it conducted no such studies or reviews.[80] The Subcommittee believes that the message conveyed by the SSA's recent preoccupation with ALJ performance is clear: there is something wrong with the ALJs' performance, and even though the SSA is prohibited by the APA from giving ALJs performance ratings, it is going to study and review the ALJs' performance until it is satisfactory to the SSA. This message is forcefully sent to the ALJs who justifiably feel that they are under constant scrutiny.[81]

B. FOCUS ON INCREASING ALJ PRODUCTIVITY

As a part of the SSA's preoccupation with the ALJ allowance rate, the SSA has also been very concerned with the ALJs' productivity.

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[77] Written statement of Administrative Law Judge Joyce Krutick Barlow, hearing record, p. 293.

[78] SSA's post-hearing responses to the Subcommittee's additional inquiries, hearing record p. 248.

[79] A listing of these studies and reviews include: Key Workload Indicators Report—Prepared monthly and for total fiscal year beginning FY80; ALJ and Hearings Office Statistics—Prepared Annually for FY81 and FY82; OHA Case Control Systems Reports: OHA-CCS-014—Production Report Administrative Law Judges, OHA-CCS-036—Hearing Office Disposition by Physical Location, OHA-CCS-048—ALJ Quarterly Production, OHA-CCS-100—Quarterly Report of Hearing Office Workload, and OHA-CCS-118—Historical Report of ALJ Reversal Rates, Excluding Dismissals; Production Among Bellmon Targeted ALJs; Processing Time and Pending Case Date for HOs with at Least Two Targeted ALJs; Characteristics of the "Ideal" Hearing Office. FY80. Study of the Effect of Staff Attorney Support on ALJ Decisional Quality; Disposition Rates and Reversal Rates, FY82; State-by-State Breakdown of ALJ Receipts and Dispositions for [the] Last 3 Quarters of FY82; Report on Special Case Study to Examine ALJ Compliance With Current CDI Policy; Data on ALJ Compliance with Currrent CDI Policy through the Bellmon Review; Report on the "Uniformity of Disability Allowance Rates (Reversal Rates) Among Adminisrative Law Judges; "Data on ALJ Compliance with the New CDI Policy through the Bellmon Review; Individual ALJ reversal rates; Report on Quality Review for October through December 1980; Processing Time Profile; Follow-up Review of Selected Low Allowance Rate ALJ Decisions; Ongoing Report of Study of OHA Standardized Test Guide; Study of ALJ Allowance Decisions (in Disability Claims) That Do Not State the Specific Regulatory Basis for the Favorable Conclusion; Hearing OH Profile FY80; Utilization of Vocational Experts, FY81; Study of Outcomes of Remand Cases—Policy on ALJ assignments in Remanded cases; Utilizations of Medical Advisors, FY81; Monitoring the Usage and Performance of Vocational Experts; Implementation of Section 304(g) of Public Law 96-265 "Social Security Disability Amendments of 1980." Report to the Congress by the Secretary of Health and Human Services, January 1982; and Medical Advisor Usage. Most of these reports and studies are retained in the Subcommittee's file, and some may be found in the hearing record. Still others have been retained by the SSA. This list is not exhaustive.

[80] A review of the reports and studies listed in footnote 79 reveals that although the Subcommittee requested that the SSA provide it with all of the studies on ALJs undertaken in the past five years, based on the information provided by the SSA, the SSA did not conduct any studies on ALJs from 1977 to 1980.

[81] See *Association of Administrative Law Judges, Inc.* v. *Schweiker, Supra*, Plaintiffs' Statement of Points and Authorities in Support of Motion for Preliminary Injunction. Retained in Subcommittee files.

Although the ALJs have almost tripled their output from 14 case dispositions per month in 1974,[82] to 40 case dispositions per month by March of 1983,[83] ALJs have been unable to keep abreast of the ever-increasing caseload, and the SSA remains dissatisfied with their efforts.

The demands by SSA for increased productivity can sacrifice the quality of the ALJ's decision and therefore limit the right of the beneficiary to a fair and full hearing. According to the Supreme Court in *Heckler* v. *Campbell*, 461 U.S. 81–1983, May 16, 1983, the Court, quoting from an Eleventh Circuit case stated:

> There is a "basic" obligation on the ALJ in these nonadversarial proceedings to develop a full and fair record, which obligation rises to a "special" duty . . . *to scrupulously and conscientiously explore all relevant facts where an unrepresented claimant has not waived counsel. Brez v. Schweiker,* 766 F.2d 135, 1364 (Call 1982) [Emphasis added].[84]

Thus, the ALJ must be afforded enough time to research and investigate a case and must be given enough time to develop and examine all of the evidence that is available. However, as ALJs are pressured to increase their productivity, they are forced to devote less and less time to each case and less and less time to the development of pertinent evidence. This is particularly harmful in view of the fact that many of the claimants that appear before the ALJ are unrepresented, and thus, the ALJ has the sole responsibility to ensure that all the necessary evidence is in the claimant's file and has been reviewed before he or she renders a decision. As ALJs are forced to process more and more claims, faster and faster, it is inevitable that the claimant's right to a full and fair hearing is being jeopardized. According to most ALJs, because of the pressure being placed upon them by the SSA, the rights of the disability claimants have already been compromised, and the quality of their decisions reduced.[85]

Pressure to increase the disposition rate manifests itself in several ways. First, there are memos to the ALJs, such as the February 3, 1983, "Productivity" memo from L. Charles Leonard, Regional Chief ALJ for Region II, to all ALJs In Charge:

> Productivity in the months of December and January was far from what we would like and what we as a Region are capable of doing. I realize that holidays, extensible leave in the absence of a declared exigency, the hiring freeze, and processing backlog have all contributed to this situation. However, I look forward to a significant improvement in the month of February . . .
>
> At the end of fiscal year 1982, our Region averaged more than the 40 dispositions per ALJ which the Associate Commissioner sought as a goal if we were to keep pace with ever-increasing receipts. From the month of February through the

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[82] *Supra* fn. 4.

[83] Memorandum entitled "March Results," dated April 4, 1983, from Louis Hays sent to all ALJs. Hearing record p. 184.

[84] *Heckler* v. *Campbell*. 461 U.S. —, [no page number available at the time of the printing of this report] No. 81–1983, May 16, 1983.

[85] See SSA ALJ Opinion Survey conducted by Professor Donna Price Cofer of Southwest Missouri State University, 1982, Section 5, Question 6. Retained in Subcommittee files.

> rest of fiscal year 1983, we should make an effort to build up to a *minimum of 45* dispositions [per month] per ALJ. . . . [Emphasis added.] [86]

And the July 1, 1982, "Quantity Quality and Integrity" memo the Regional Chief ALJ for Region X included the following:

> *First of the three goals addressed by Lou Hays was quantity.* The pending caseload increases every month, i.e., April 143,323 and May 144,400. Although dispositions increase every month they tend to stay about 1,000 behind receipts. Projections are for a pending [caseload] of approximately 200,000 cases by mid-1984.
>
> The production goal is for a disposition rate per ALJ of 40 [per month] by the end of FY82 (9-30-82) and 45 each by the end of FY83 (9-30-83).
>
> Twenty-five percent of all ALJs have already reached the goal of 45 [case dispositions] per month. There are approximately 782 ALJs on board so we are talking about 195 plus. This does not represent a lunatic fringe but a substantial number of ALJs who are meeting the goals. . . . [Emphasis added.] [87]

In addition, the message of the SSA's expectations regarding the productivity of its ALJs was clearly outlined in a December 29, 1981, memo from the Director of the Office of Appraisal to Louis Hays, entitled, "Characteristics of the 'Ideal' Hearing Office FY 80," which stated in part that:

> . . . According to the data for FY80, the most effective of our hearing offices is characterized by an average disposition rate of 45 cases per month . . .
>
> *The least effective of our hearing offices is characterized by an average disposition rate of 20 cases per month* . . . [Emphasis added.] [88]

These memos contradict the statements made at the Subcommittee hearings by Louis Hays when he said:

> As I previously mentioned, *we have no goal or quotas for individual ALJ productivity.* [Emphasis added.] [89]

He went on to prove just what he had denied:

> . . . However, all SSA employees, including ALJs, are required to perform at a minimally acceptable level of efficiency and proficiency, and to work to the full extent of their capabilities. In order to achieve this end, the Chief Administrative Law Judge monitors the productivity of the ALJs. This is an ongoing process and periodically those ALJs whose production averaged 20 or fewer final dispositions per month for at least 6 months are put on notice by the Chief Administrative Law Judge that their decisional output was considerably be-

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[86] Retained in Subcommittee files.
[87] Hearing record, p. 343.
[88] Hearing record, p. 222.
[89] Hearing record, p. 17.

> low the norm established by their peers. They are asked to improve their productivity and to advise their respective Regional Chief Administrative Law Judges of any assistance they require to improve their productivity.[90]

Second, in an exchange between Senator Cohen and Mr. Hays during the hearing, Mr. Hays made the following statements:

> Senator COHEN. I have a document which says, "OHA initiatives and objectives." Item No. 4 on this particular document says, "Achieve a disposition rate of 40 per month per judge by September 1982, 45 per month per judge by September 1983."
>
> Now, what does that mean?
>
> Mr. HAYS. I do not know specifically what that document is. But as I stated, I have what, in effect, is my personal goal, my personal expectation, that on the average our administrative law judges will accomplish levels in that range. I have further——
>
> Senator COHEN. Wait a minute. What do you mean, your personal goals? Where did you get these personal goals? Did you check with the administrative law judges?
>
> Mr. HAYS. Yes, as a matter of fact.
>
> Senator COHEN. And they thought they could double their caseload?
>
> Mr. HAYS. Given the fact that we were making substantial increases in the support staff to assist the administrative law judges; given the fact that we were doing such things as for the first time providing state-of-the-art word processing equipment for all of our hearing offices; given those sorts of initiatives, given more resources to administrative law judges; all of those things together with the other important ingredient of the motivation and professionalism of the administrative law judges, we thought those sorts of results could be achieved. And, in fact, we are seeing results such as that.
>
> I have further stated publicly that, in my opinion, it is very difficult to envision ever seeing an average disposition rate for our corps of administrative law judges go beyond the 40 to 45 level, and that if the number of hearing receipts continues to increase and if the number of pending cases continues to increase, then the only solution will be to hire additional administrative law judges and additional support staff.[91]

However, contrary to Mr. Hays statement, on at least three separate occasions, SSA officials, including Mr. Hays, have directly and indirectly indicated that they expect that the ALJs may be able to achieve a disposition rate as high as 60 cases per month. First, in a 1981 Government Accounting Office (GAO) report,[92] the GAO reported that a deputy chief ALJ referring to the "OHA Office Reconfiguration" (to be discussed later in this report) indicated that he believed that "the experiment [would] show that each ALJ will be able to hear 60 cases per month."[93] Second, in a May 1981 memo from the Regional Chief ALJ for Region X Doris Coonrod, regarding "April 1981 Production," ALJ Coonrod made the following statement:

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[90] Hearing record, p. 17.

[91] Hearing record, p. 24.

[92] Report to Senator Max Baucus, prepared by the U.S. General Accounting Office, June 2, 1981, Subject "Social Security Administration Policies for Managing Its Administrative Law Judges." (HRD-81-91) Retained in Subcommittee files.

> I am extremely pleased to announce that Judge George Wise set a new record in the region for month dispositions. He and his staff processed 60 dispositions in the month of April. He is to be congratulated for his achievement.[94]

And, finally, in a December 1981 memo from Mr. Hays to all ALJs, regarding "Hearing Office Reconfiguration," Mr. Hays stated:

> . . . The purest application of this concept of functional organization is in the Des Moines Hearing Office. During the experimental period of October 1980 through July 1981, the office staff consisted of five ALJs, two staff attorneys, five hearing assistants, nine clericals, and a hearing office manager. . . . Although the support staff ratio subsequently increased, the monthly disposition rate is now average about 60 cases [per month, per ALJ] . . .
>
> I have been impressed with these results and have concluded that this approach is a valid one that should be employed in offices where performance needs improvement to meet the challenge of the ever-rising caseload.[95]

Thus, contrary to the indications of Mr. Hays in his testimony before the Subcommittee, it is clear to the Subcommittee that ALJs cannot expect SSA demands regarding their productivity to disappear once they have achieved the 45-case disposition goal, but rather ALJs may expect the SSA's productivity goals and pressure to attain those goals will continually increase in direct relationship to the number of requests the SSA receives for ALJ hearings.[96]

In addition to pressuring the ALJs as a group to achieve certain levels of productivity, as indicated earlier in Mr. Hays' testimony, pressure to achieve high productivity is sometimes focused directly on an individual ALJ. In addition to having the Chief ALJ talk to those ALJs whose productivity is low, as mentioned by Mr. Hays, the SSA also sends special memos to individual ALJs who appear to need special motivation. These memos are called "low producer memos."[97]

> Between June and December of 1980, 28 ALJs received letters from their respective regional chief ALJ soliciting ways management could assist them in improving their productivity. An additional four ALJs were counseled by their regional chiefs. These 32 ALJs had average production rates of 20 or fewer cases per month for the six-month period between September 1979 and February 1980. OHA central office prepared the list and distributed it to the regional chief ALJs."[98]

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[93] Id. at p. 7.

[94] Retained in Subcommittee files.

[95] Hearing record, p. 226.

[96] Based on statements made by Louis Hays before the House Social Security Subcommittee in October 1981. See *supra* fn. 4, page 72.

[97] *Supra* fn. 93 at 5.

[98] Id.

According to the SSA, "the intent of the letters was only to solicit methods to improve productivity."[99] However, some of the targeted ALJs did not feel that way.

> One ALJ who received a letter filed a grievance with OHA. He believed that, although it did not constitute a performance rating the letter threatened punitive action by requiring him to improve his processing [time] or defend his current level of production.[100]

The SSA's efforts to increase ALJ productivity have not stopped at memos and counseling. Indeed if after the memos and counseling an ALJ still does not respond, formal disciplinary action, including procedures for removal, are instituted against the ALJ in question. Over the past five years, of the 21 removal or suspension actions instituted against ALJs by all government agencies, 16 were instituted by the SSA.[101] There are several disconcerting aspects to this fact. First, the SSA is the only agency to have ever instituted a removal action against an ALJ because of low productivity, even though ALJs in other government agencies dispose of far fewer cases.[102] Second, in the past three years, the SSA has instituted more removal actions against ALJs than all of the other agencies have instituted against ALJs since the establishment of the ALJ corps.[103]

In three recent cases before the MSPB, the SSA argued that the ALJs' inability or refusal to dispose of more than 20 cases per month over a 12-month period was indicative of substandard performance and that substandard performance was tantamount to incompetence and therefore within the province of the definition of "good cause," meeting the necessary criteria for removal.[104] The MSPB ALJs who presided over these actions agreed with the SSA's arguments in 2 of the cases and concluded that 20 case dispositions per month was an acceptable minimum standard of performance. Once case was dismissed pursuant to the ALJ's retirement. The two remaining actions are currently awaiting the recommendation of the MSPB.

In the past, productivity has not been a recognized standard for determining good cause.[105] Both the SSA and the MSPB ALJs seem to be breaking new ground in this area. The Subcommittee does not have the substantive background to fully address this issue, since it involves consideration of the proper standard for good cause removal, an issue best addressed by the House and Senate Judiciary Committees with legislative jurisdiction in this area. However, the subcommittee does have great concern over the arbitrary selection by the SSA of the 20-

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[99] Id. at 6.

[100] Id.

[101] Data Provided by MSPB. See Hearing record, pp. 265–268. Thus far, the SSA has succeeded in 6 of 8 removals and there are currently 9 actions pending before the MSPB.

[102] Although the cases handled by ALJs in other agencies are quite different from those handled by the ALJs in the SSA, and it is difficult to compare the relative productivity of ALJs in other agencies to that of the SSA ALJ, in a conversation between the Chief ALJs at the NLRB and the Department of Labor (the agencies with the greatest productivity and number of ALJs employed after the SSA) and the Subcommittee staff, the judges indicated that the NLRB ALJ dispose of *1–25 cases per year*, and the Department of Labor ALJ disposes of *1–75 cases per year*.

[103] *Supra* fn. 101.

[104] See *SSA* v. *Robert W. Goodman*. MSPB, No. HQ75218210015, April 23, 1982; *SSA* v. *Irving Shore*. MSPB No. HQ75218210013, April 23, 1982; and *SSA* v. *Stanley M. Balaban*, MSPB No. HQ75218210014, April 20, 1982.

[105] *Supra* fn. 34.

case minimum. The SSA has not provided the Subcommittee with a satisfactory explanation as to why a disposition rate of 20 cases a month is an appropriate measure of minimally acceptable productivity.[106]

Finally, although the Subcommittee recognizes that there has been an increase in the support staff available to the ALJs, from an average of 3.7–1 in 1980,[107] to 4.7–1 in 1982,[108] the Subcommittee does not believe that this increase has been sufficient to offset the negative impact that the SSA's pressure to increase productivity is having on the ALJs and the disability claimants.

C. Reducing the ALJ Allowance Rate by Limiting the ALJ's Decisional Independence

1. INCORPORATION OF POMS INTO SSRS

The Program Operation Manual Systems (POMS), are defined as internal policy guidelines designed to amplify and explain Social Security Rulings (SSRs) and SSA regulations.[109] POMS are issued by the SSA and reflect the agency's position and policy. POMS are not subject to congressional or public review or comment; they are revised on a continuing basis and are circulated throughout the agency, but are specifically intended for the state disability examination offices.[110] SSRs are agency rulings issued by the SSA, but unlike POMS, SSRs are binding on all adjudicative personnel at both the State and Federal levels.[111]

Although POMS are supposed to explain SSRs and Federal regulations, POMS sometimes differ from SSRs and Federal regulations. Moreover, since the SSA began incorporating POMS into SSRs in 1981,[112] many SSRs now differ from their corresponding Federal regulations. Thus, the incorporation of POMS into SSRs affects the entire evaluation system.

There are two clear examples of these differences. First, with respect to the rules and regulations governing "Impairment Severity and Residual Functional Capacity" and second, with respect to the rules and regulations governing "Medical Equivalency."

a. "*Impairment Severity and Residual Functional Capacity*"

POMS DI 2107 outlines the sequential procedure to be used in determining whether an individual is disabled. In discussing how the severity of an individual's impairment should be evaluated, the POMS lists 20 examples of impairments that should be exclusively regarded as non-severe, irrespective of any other factor.

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[106] Id.

[107] Fiscal year 1980 Performance and Resources Profiles. Retained in Subcommittee files.

[108] Information contained in "ALJ and Hearing Office Statistics, FY 82." Retained in Subcommittee files. Upon checking with the OHA, for updated figures, the OHA indicated that the ALJ 4.7 to 1 ratio has stayed the same in the last year. Documentation retained in Subcommittee files.

[109] *Supra* fn. 10, p. 7.

[110] Id.

[111] Id.

[112] See the testimony of Louis B. Hays and Charles Bono before the House Ways and Means Committee, Subcommittee on Social Security, October 23 and 28, 1981, and a letter dated October 27, 1981, from Gray C. Adams, Deputy Director, Disability Evaluation Division to the Chief Counsel of the House Committee on Ways and Means, Social Security Subcommittee, hearing record pp. 6, 115 and 220, respectively. See also H.R. 3207 (Proposed Amendments to the Social Security Act.)

POMS DI 2107 corresponds directly to SR 82–55. Prior to the incorporation of the POMS, SSR 82–55 made no reference to impairments that were to be considered presumptively non-severe. However, the language of the POMS was incorporated verbatim into the SSRs' section on "Policy Statement" and the 20 presumptively non-severe impairments were included in the SSR.[113] Thus, a conflict was created between SSR 82–55 and 20 C.F.R. 416.921, which does not contain any listing of presumptively non-severe impairments.[114] The net effect, should ALJs subscribe to the ruling instead of the regulation, is to automatically preclude an evaluation of functional capacity for the 20 non-severe impairments, as presently allowed under the regulations.

b. "Medical Equivalency"

POMS DI 2104(B) outlines the procedure for determining whether a medical impairment meets the SSA's "Listing of Impairments" and therefore is eligible for benefits. It also outlines when and how medical judgment and evidence should be used and includes the following statements:

> (1) As in determining whether the listing is met, it is incorrect to consider whether the listing is equalled on the basis of an assessment of *overall* functional impairment.
>
> (2) The functional consequences of the impairments, irrespective of their nature or extent, *cannot* justify a determination of equivalence. [Emphasis supplied.] [115]

Again, the language of POMS 2104(B) was incorporated verbatim into the "Policy Statement" section of the corresponding SSR, SSR 83–19. This created a conflict between SSR 83–19 and 20 C.F.R. 416.920 (d) which governs the criteria for medical equivalency, but sets none of the limitations outlined in the POMS language.[116] The resulting problem was characterized by Annette Abrams, Director, Office of Intergovernmental Relations for the Michigan Department of Mental Health, this way:

> The concept of equivalency was to allow for medical judgment because in SSA's words, "impairment manifestations are so numerous and varied that it is difficult to include in the listings all the sets of medical findings which describe impairment severe enough to prevent gainful work." Having so stated [SSA] then removed the basis for judgment by emphasizing that decisions cannot be based on an *overall* assessment or on the functional consequences of the impairment. One may well ask if there is any room left for medical judgment within the POMS' [sic] cookbook approach. [Emphasis added.] [117]

The incorporation of POMS into SSRs greatly impacts upon the decisional independence of the ALJs who through actions of the

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[113] See Directory of the SSA Program Policy and Operations—Compilation of Social Security Disability Rulings, TN 1 1–83 Social Security Disability Rulings PP 00101.003.

[114] 20 C.F.R. 416.92(a) states: "An impairment is not severe if it does not significantly limit your physical or mental abilities to do basic work activities."

[115] *Supra* fn. 113.

[116] 20 C.F.R. 416.920(d) states:

"When your impairment meets or equals a listed impairment in Appendix 1. If you have an impairment which meets the duration requirement and is listed in Appendix 1 of Subpart P of Part 404 of this chapter or is equal to a listed impairment, we will find you disabled without considering your age, education, and work experience."

[117] Hearing record p. 320.

SSA are being forced to apply strict guidelines by which they were not previously bound. In reviewing the overall effect of this policy, the Subcommittee believes that by incorporating POMS into SSRs, the SSA is limiting the ALJs' scope of judgment for the determination of eligibility, and thus limiting the ability of the ALJs to make otherwise valid allowance decisions.

2. SSA'S POLICY OF NON-ACQUIESCENCE

Non-acquiescence is the term given to the SSA's policy of refusing to apply the rulings of certain court decisions beyond the individual cases in which the decisions were rendered. This practice is highly controversial and raises some very serious legal and constitutional questions. These questions focus primarily on the relationship between the Executive and Judicial branches of government, and the authority of the court to make and interpret laws which are binding on all litigants.

The SSA has articulated its particular non-acquiescence policy in two recent documents. First, section 1.161 of the Office of Hearings and Appeals Handbook states that:

> While the ALJs are bound by decisions of the United States Supreme Court, they should also make every reasonable effort to follow district or circuit [decisions] in matters where handling similar cases in that particular district or circuit. *However, where a district or circuit court's decision contains interpretations of the law, regulations or rulings which are inconsistent with the Secretary's interpretation, the ALJs should not consider such decision binding on future cases simply because the case was not appealed.* In certain cases, the SSA will not appeal a court decision it disagrees with, in view of special circumstances of the particular case (e.g., the limited effect of the decision). When SSA decides to acquiesce in a district court decision, which is inconsistent with our previous interpretation of the law, regulation or ruling, SSA will take appropriate action to implement changes by means of regulations, rulings, etc. ALJs will be promptly advised of such action. [Emphasis added.] [118]

Second, in a memorandum issued to all ALJs by Louis Hays on January 7, 1982, discussing "Adjudicatory Policy," Mr. Hays quoted the following statement made by Frank Dell 'Acqua, the Deputy Assistant General Counsel of the SSA:

> . . . . [T]he federal courts do not rule SSA's programs . . . ALJs are responsible for applying the Secretary's policies and guidelines regardless of court decisions below the level of the Supreme Court. Court decisions can result in the changing of policies, but it is not the role of ALJs to independently institute those changes. [Emphasis added.] [119]

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[118] Retained in Subcommittee files.
[119] Hearing record, p. 216.

The SSA has two ways of effectuating its non-acquiescence policy. The SSA may issue a formal written "ruling of non-acquiescence" in which it outlines the court decision to which it will not acquiesce and the SSA's policy regarding the issue(s) decided by the court [120] or the SSA may simply ignore a court decision and not mention it in any agency memorandum or policy statement.[121]

There have been eight formal SSA rulings of non-acquiescence in the past 16 years.[122] The number of unwritten non-acquiescence decisions is unknown.[123] Four of the rulings are particularly pertinent to the controversies surrounding the disability program.

a. *Finnegan* v. *Matthews*, 641 F.2d 1340 (9th Circuit 1981)[124]

This case involved the question of the continuing eligibility of persons "grandfathered" into the Supplemental Security Income (SSI) program, established by Congress in 1972.[125] Under this program the Federal Government assumed the responsibility previously assigned to the States to provide financial assistance to the needy aged, blind and disabled in accordance with the provisions of the Social Security Act.[126] Unlike the SSDI program which provides benefits to disabled workers and their dependents based on previous employment and wages, SSI benefits are not contingent upon proof of previous employment.

Pursuant to the provisions of the Act, an individual who had been on a State disability assistance program for at least six months prior to the effective date of the Federal program was transferred to the Federal benefit rolls. Persons who met this criteria were classified as "grandfatherees."

In the *Finnegan* case, pursuant to a disability review, the SSA terminated the benefits of the claimant, a grandfatheree, finding that he did not meet the requirements for entitlement at the time of his review. The district court affirmed the SSA's decision. However, the Ninth Circuit Court of Appeals reversed both the district court and the SSA, holding that:

> [SSI disability] benefits to a grandfatheree must not be terminated absent proof of material improvement in [the grandfatheree's] medical condition or the commission of a clear and specific error in the prior state determination.[127]

Outlining the SSA's position, the non-acquiescence ruling stated the following:

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[120] Copies of the SBA's rulings of non-acquiescence are retained in Subcommittee files.

[121] Written statement of Elena Ackel, one of the attorneys for the plaintiffs in *Lopez* v. *Heckler*, hearing record, p. 107. This information was also confirmed by Donald Gonya, Assistant General Counsel for the SSA in a conversation with Subcommittee staff. See fn. 123 *infra*.

[122] Hearing record p. 238.

[123] In a conversation between Donald A. Gonya, Assistant General Counsel, Social Security Division, Office of the General Counsel, Health and Human Services Department, and Subcommittee staff, on or about July 21, 1983, Mr. Gonya indicated that the SSA's policy of non-acquiescence was probably in effect between 1969 and 1979, but during this period, the SSA did not issue any formal written rulings of non-acquiescence decision. Therefore, it is impossible to determine how many non-acquiescence decisions there were. This, he indicated, was also true for the period prior to 1969.

[124] SSA Non-acquiescence Rulings—82-10C, SSRs for 1982, p. 303. Hearing record p. 430.

[125] 42 U.S.C.A. §§ 1351–1355, P.L. 92–603 (repealed 1972).

[126] 42 U.S.C.A. §§ 1381–1383.

[127] *Finnegan* at 1347.

SSA believes that the court's standard for determining whether SSI disability benefits to a grandfatheree should terminate would be impossible to administer and that the correct standard for making such a determination is in 20 C.F.R. 416.994(e); i.e., that disability of a grandfatheree terminates when his or her disability is shown by current medical or other evidence does not meet the criteria of the appropriate state plan and does not meet the Federal criteria.[128]

b. *Patti* v. *Schweiker*, 669 F.2d 582 (9th Circuit 1982)[129]

This case involved the question of the continuing eligibility of a "non-grandfatheree" in the SSI program. Here again, reversing the decision of an ALJ, the SSA terminated the benefits of the plaintiff, Ms. Patti, a "non-grandfatheree," finding that she was no longer disabled. This determination was affirmed by the district court; however, on appeal to the Ninth Circuit Court of Appeals, the court reversed the SSA's termination decision and held that:

> The determination of disability in 1978 gave rise to a presumption as did the hearing in 1979, that the claimant was still disabled [and] that the presumption imposes on the Secretary the burden of going forward with evidence that the claimant's condition has medically improved or otherwise changed.[130]

This decision was in direct contradiction to the SSA's position which was outlined in the following statement:

> [R]egardless of whether medical improvement or other change is or is not shown under 20 C.F.R. 416.994(b)(1), a determination of cessation is appropriate for an SSI non-grandfatheree if the recipient is not disabled under the federal criteria, i.e., current medical or other evidence shows that the recipient is able to engage in substantial gainful activity.[131]

Both the non-acquiescence rulings in *Finnegan* and *Patti* have been the source of much controversy. Although the SSA once employed the medical improvement standard,[132] it has not done so since 1976,[133] despite the fact that in recent years there have been 18 lawsuits challenging the SSA's refusal to do so.[134]

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[128] *Supra*, fn. 124.

[129] SSA Non-acquiescence Ruling—SSR 82–49c–SSR for 1982, p. 311. Hearing record, p. 438.

[130] Id. and *Patti* at 587.

[131] *Supra* fn. 129.

[132] See testimony of Peter J. McGough, Director, Office of Program Planning, GAO, before the House Subcommittee on Social Security, Committee on Ways and Means, June 30, 1982, for further details. Retained in Subcommittee files.

[133] Id.

[134] Cases challenging the SSA's refusal to use the medical improvement standard include: *Finnegan* v. *Matthews*, 641 F.2d 1340 (1981). *Patti* v. *Schweiker*, 669 F.2d 582 (1982); *Morrison* v. *Heckler*, CA No. C82–888–v, U.S.D.C. for the Western District of Washington, January 1983; *Griffith* v. *Weinberger*, 509 F.2d 837 (9th Cir. 1975); *Day* v. *Weinberger*, 522 F.2d 1974 (9th Cir. 1975); *Rhodes* v. *Schweiker*, 660 F.2d 722 (9th Cir. 1981); *Almdale* v. *Heckler*, filed May 6, 1983, in the District of Alaska No. A83–242 CIV; *Lopez* v. *Schweiker*, CA No. 81–7189.7, U.S.D.C. Central District of California (1983); *Miranda* v. *Sec. of HEW*, 514 F.2d 996 (1st Cir. 1975); *Cassidy* v. *Harris*, 663 F.2d 745, 749 (7th Cir. 1981); *Weber* v. *Harris*, 640 (F.2d 176 (8th Cir. 1981); *Simpson* v. *Schweiker*, 691 F.2d 966, 969 (11th Cir. 1982); *Hall* v. *Celebrezze* 314 F.2d 686 (6th Cir. 1963); *Rivas* v. *Weinberger*, 475 F.2d 255, 258 (5th Cir. 1973); *Trujillo, et al.* v. *Schweiker*, C.A. No. 82–K–1505 U.S.D.C. for the District of Colorado, decided August 16, 1983; *Paskel* v *Heckler*, CA No. 83–1201, U.S.D.C. for the Eastern District of Pennsylvania, filed March 30, 1983; *Chee* v. *Schweiker*, CA No. Civ.–82–693–PCJ VAC 1982 U.S.D.C., District of Arizona; *Kuzmin* v. *Schweiker*, No. 82–5705 (3rd Cir.), decided August 18, 1983.

Two other significant non-acquiescence ruling are *Levings* v. *Califano*, 604 F. 2d 591 (8th Circuit, 1979),[135] and *Campbell* v. *Secretary of Health and Human Services*, 665 F. 2d 48 (2nd Circuit 1981).[136] In *Levings*, the issue was whether a person who voluntarily resides and pays for the services in a publicly run nursing home is eligible for SSI benefits. According to the SSA, such persons were "inmates" of a public institution and therefore ineligible for benefits. This rule greatly affected many mentally disabled claimants who, feeling unable to care for themselves, chose to reside in publicly run homes and pay for the services provided there. Addressing this issue, the Eighth Circuit Court of Appeals made a distinction between persons involuntarily committed to a public institution at the taxpayers' expense, and persons residing in public institutions voluntarily and at their own expense, finding that the latter were not "inmates" and were therefore eligible to receive SSI benefits.

In *Campbell*, the issue turned on the opportunity of the claimant to do other work. In this case, the SSA terminated a claimant's benefits, finding that although the claimant was unable to do her previous job, she could do "light work." However, the SSA did not specify what type of work was included in its definition of "light work." The district court affirmed the SSA's decision, but on appeal to the Second Circuit Court of Appeals, the court held that in a determination of this nature, the SSA had to specify the type of work the claimant could do, and thereby give the claimant the opportunity to show that he or she is not able to perform such work.[137]

In an effort to defend its policy of non-acquiescence, the SSA has often asserted that its policy is no different than that of the Internal Revenue Service (IRS).[138] However, there is one critical distinction between non-acquiescence as practiced by the IRS and as practiced by the SSA. When the IRS declines to follow a decision of a federal court, unlike the SSA, it usually follows the decision at the administrative appeals level within the circuit or district in which the decision was rendered although it may not follow the decision in any other circuits or districts.[139] In addition, as noted by Paul Bender, Professor of Constitutional Law at the University of Pennsylvania School of Law.

> . . . It seems to me regardless of what happens with the IRS, this is a different situation. Here it has been said many times, if people lose benefits because of an administrative decision and the administration does not acquiesce, they are going to be without those benefits for a substantial period of time until they bring their own lawsuit or perhaps they will have to go up to the circuit level. That is a tremendous hardship on people." [140]

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[135] SSA Non-acquiescence ruling—SSR 80-11c. SSR for 1976–1980 p. 455. Retained in Subcommittee files.

[136] SSA Non-acquiescence ruling—SSR 82-33c—SSR for 1982 p. 152. Retained in Subcommittee files.

[137] In *Heckler* v. *Campbell* 461 U.S. ----. [no page number available at time of printing of report], the Supreme Court overturned the Court of Appeals ruling.

[138] See *Lopez* v. *Schweiker*, Defendant Brief in Support of Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction. Excerpts contained in hearing record p. 403. Copy of Brief retained in Subcommittee files.

[139] Based on information obtained in a conversation between the Deputy Chief Counsel for the IRS, Joel Gerber, and the Subcommittee staff in May 1983. See also footnote 11 of fn. 121 *supra*.

[140] Testimony of Professor Paul Bender, hearing record p. 140.

The SSA's policy most closely mirrors that of the National Labor Relations Board (NLRB). However, in two recent cases the courts spoke vociferously against the NLRB's policy.[141] Particularly, in *Allegheny General Hospital* v. *NLRB*. The Third Circuit Court of Appeals stated that:

> A decision by this court, not overruled by the U.S. Supreme Court, is a decision of the court of last resort in this Federal judicial circuit. *Thus, our judgments are binding on all inferior courts and litigants in the Third Judicial Circuit and also on administrative agencies when they deal with matters pertaining thereto.* [Citation omitted. Emphasis added.] [142]

Although the weight of judicial comment has been against the policy of non-acquiescence, on at least one occasion a court has spoken in favor of the policy.[143] Upholding a finding of the Railroad Retirement Board, the Seventh Circuit Court of Appeals stated:

> . . . we are unaware of any decisions requiring an agency to either appeal a circuit court holding or accept it as binding on the agency in all circuits where review could have been sought. Thus, the agency was bound to comply with the court's decisions only with regard to that litigant. [Citation omitted.] [144]

Nevertheless, the courts have taken specific exception to the SSA's policy. In a recent Arkansas case, the Eighth Circuit Court of Appeals held that:

> . . . the regulations of the HHS are not the supreme law of the land . . . It is emphatically the province of the judicial department to say what the law is . . . and the Secretary will ignore that principle at his peril. [Citation omitted.] [145]

Although the Supreme Court has not ruled on the SSA's policy of non-acquiescence, the Subcommittee has received testimony and legal briefs from individuals and organizations in various sectors of the legal community which argue that the SSA's policy violates three very basic tenets of American jurisprudence: (1) the doctrine of separation of powers; (2) the doctrine of *stare decisis*; and (3) the claimant's right to due process.

First, opponents of the policy argue that under the landmark case *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, (1803), and its progeny, it was unequivocally established that the judicial branch of government has the exclusive right and authority to interpret and enunciate the law, but through the use of the policy of non-acquiescence, the SSA attempts to reserve unto itself the right to interpret the law in direct contradiction to the mandate of the Constitution.

Second, opponents of the policy also argue that the policy ignores the doctrine of *stare decisis* which provides that the rule of a case creates binding precedence for all subsequent litigants; and inasmuch as administrative agencies are bound by the rulings of Federal Circuit Courts,[146] the SSA's non-acquiescence policy subverts the doctrine of *stare decisis*.

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[141] See *Ithaca College* v. *NLRB*, 623 F.2d 224 (2d Cir. 1980) and *Allegheny General Hospital* v. *NLRB*, 608 F.2d 965 (3d Cir. 1979). Retained in Subcommittee files.

[142] *Allegheny General Hospital* at 970.

[143] See *Frock* v. *United States Railroad Retirement Board*, 685 F.2d 1041 (7th Cir. 1982).

[144] Id. at 1046.

[145] *Hillhouse* v. *Harris* at 93.

Finally, opponents of the policy argue that as provided by *Matthews* v. *Eldridge*, 424 U.S. 319 (1976), SSDI benefits are "protected interests," and therefore under *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), and *Bell* v. *Burson*, 402 U.S. 535 (1971), the SSDI adjudicative process must afford the claimant adequate protection of his or her due process rights. These rights include the right to a full, fair and meaningful hearing that allows for the consideration of *all* relevant issues. However, the SSA's non-acquiescence policy precludes the claimant from receiving a *full* hearing on all relevant issues because it ignores certain issues that the courts have previously deemed to be relevant.

The SSA contends that there is no legal doctrine that mandates that a Federal administrative agency is bound by the rulings of any Federal court below that of the Supreme Court, and that the Executive and Judicial branches of the Federal Government are co-equal, and neither can impose its will on the other. Thus, according to the SSA, the policy-non-acquiescence does not undermine the power of the Federal courts, but simply preserves the SSA's right to continue to litigate disputed issues.[147]

The most recent and significant judicial ruling on the SSA's non-acquiescence policy came with the decision in *Lopez* v. *Heckler*, CA No. 81-71897, U.S.D.C. Central District of California issued on June 16, 1983, by Judge William P. Gray. In this case, a class of disabled individuals and organizations representing disabled individuals residing in the Ninth Circuit, filed a suit against the SSA, seeking to enjoin the SSA from continuing to non-acquiesce to the earlier Ninth Circuit Court of Appeals decisions in *Patti* and *Finnegan* which required the use of the medical improvement standard in all SSA termination evaluations.

Ruling in the plaintiffs' favor, the court granted plaintiffs' request for a preliminary injunction and ordered the SSA to reinstate and review anyone who had been terminated without a showing of medical improvement in the Ninth Circuit in conformity with the decisions in *Patti* and *Finnegan*. Pursuant to this order the SSA issued a notice to 34,000 of the *Lopez* class members advising them that their claims would be re-evaluated, but also sought a stay in the Ninth Circuit Court of Appeals on the issues of reinstatement and payment of benefits. The Circuit Court denied the stay. However, the SSA appealed the Circuit Court's decision to the Supreme Court and was granted a temporary stay pending further consideration of the Court by Justice William Renquist.[148] On October 11, 1983, in a 5-4 decision the Court denied respondents' emergency application to vacate the stay entered by Justice Renquist.

Non-acquiescence harms disability recipients because it makes each individual fight the long and costly battle that was already won by a previous claimant. A claimant's ability to continue to receive benefits may very well depend on his or her perserverance and ability to fund litigation. For those unable to do just that, it means that they will be judged by a stricter standard than their stronger and more fortunate associates.

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[146] See *Ithaca College* v. *NLRB* and *Allegheny General Hospital* v. *NLRB*, *supra* fn. 186; and *Hillhouse* v. *Harris*, *supra* fn. 21.

[147] *Supra* fn. 138.

[148] *Heckler* v. *Lopez* et al., No. A-145, Supreme Court of the United States, Application for Stay, September 9, 1983. Retained in Subcommittee files.

The ALJs are also detrimentally affected by the SSA's policy of non-acquiescence. The ALJs' predicament was described in *Hillhouse v. Harris*, when the court indicated that the ALJs are caught in the most unenviable position of "trying to serve two masters; the courts and the Secretary of Health and Human Services." [149] Moreover, this situation is demoralizing to the ALJs who know that their judicial efforts may be meaningless. If they adhere to the SSA's non-acquiescence ruling, their decisions may be overturned in Federal court because they failed to follow precedent; and if they adhere to the courts' decisions, their decisions may be overturned by the SSA through the Appeals Council. To say the least, this practice creates a professional and judicial quandry for the ALJ.

D. Additional Pressures on Administrative Law Judges Aimed at Securing Their Conformity to SSA Policies

Another avenue affecting ALJ decisionmaking is by the SSA's use of the continuing education program.[150] This program is for ALJs who have been with the agency for more than two years and have not attended a recent training session.[151] The purpose of this program, according to the SSA, is to "familiarize the ALJs with a series of Social Security Rulings being published that set forth the agency's basic disability program policy."

Although on its face this training program seems quite reasonable, the SSA has sometimes used the training sessions in a punitive manner. Describing his experience with a training session, Administrative Law Judge Jerry Thomasson stated the following:

> . . . I got a call from Chief Judge Phillip Brown, through the regional chief judge, telling me they wanted me in Washington the following Tuesday morning for training. They gave me a room number in a building south of Washington, near Fort Belvoir. So I said, "Are any other judges going from the office?" And they said, "No. The idea is that you can teach the other judges how to write decisions."
>
> So, anyway, I went up there, and I went to the room at the appointed time, and it was a class of new Administrative Law Judges. So I sat at the back of that room for three days. [It was] a very humiliating experience, since [I] didn't feel [I] had done anything criminally wrong to be punished for, and [I'd] always worked hard and got the cases out. One of my claimants killed himself while I was there. He would have received his favorable decision prior to that but for the aforementioned harassment.[152]

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[149] *Supra* fn. 145.

[150] SSA responses to the Subcommittee's pre-hearing questions. Hearing record, p. 160.

[151] Id.

[152] Testimony of Administrative Law Judge Jerry Thomasson before the House Subcommittee on Social Security, Committee on Ways and Means, June 30, 1983, for further details. (Page number not available at time of printing of this report.)

The SSA has also attempted to further reduce the ALJs' discretion by standardizing the ALJ hearing process through the implementation of "reconfiguration." In describing "reconfiguration," the SSA indicated the following:

> In its simplest terms, it changes the existing individual ALJ hearing unit method of case processing in favor of specialized units. These specialized units handle various aspects of case processing such as development, decision writing and decision typing and mailing in a centralized fashion. A major benefit of this system is that it is not solely dependent on an individual's ability (either the ALJ, or hearing assistant, or staff attorney, etc.) but rather capitalizes on group accomplishment.[153]

Implemented on an experimental basis in October 1980, reconfiguration was originally effectuated in only six hearing offices.[154] The reconfiguration managerial structure was expanded to thirty hearing offices in 1982.[155] Although, according to the SSA, this system allows for greater productivity,[156] under this system the ALJ no longer has individual staff assistance and may be deterred from developing a stable working relationship with any of the hearing office staff. Moreover, this approach has caused some staffing problems. Because the hearing office staff operates in groups, it is difficult to convey the same sense of individual responsibility. Most importantly, however, because under reconfiguration the ALJ no longer personally writes his or her decisions (except under very special circumstances, but merely provides the coordinator of the decision-writing pool with an outline of the decision which is subsequently assigned to a member of the pool, much of the individual ALJ input into the decision-writing process is lost. Thus, by standardizing the structure and relationships within the hearing offices, the SSA is restricting even further the individual discretion of the ALJs.

In addition to implementing changes within the hearing offices that undermine the ALJs' role in the SSDI adjudicative process, the SSA is also seeking to implement the face-to-face evidentiary hearing at reconsideration in a way which minimizes the role of the ALJ. The requirement for a face-to-face evidentiary hearing at reconsideration was enacted into law in 1983.[157] The SSA was directed to have such a hearing process in place by January 1, 1984.[158] As outlined in the SSA's proposed regulations, Federal employees (hearing officers) will be hired to conduct these evidentiary hearings.[159] According to the "Summary of the Meeting with DDS Advisory Committee on the Implementation of P.L. 97–455," [160] the hearing officers will be allowed 20 minutes to review the claimant's file before the hearing; each hearing is to take no more than 30–45 minutes; and, the hearing officer is permitted only 20 minutes immediately after the hearing to make a decision. The hearing itself is to be non-adversarial, although a claimant does have the right to have counsel present, and the hearing officer must prepare a summary of the facts and evidence presented, but no official record is made.[161]

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[153] *Supra* fn. 95.

[154] Memorandum entitled "ALJ Policy Council Meeting," dated January 7, 1982, from Associate Commissioner, OHA to all ALJs, at p. 5. Retained in Subcommittee files.

[155] Id.

[156] Id.

[157] P.L. 97–455 (enacted on January 12, 1983).

[158] Id. at §§ 4,5.

[159] See *Federal Register,* Vol. 48, No. 158, Monday, August 15, 1983. Proposed Rules p. 36831.

[160] Retained in Subcommittee files.

Reporting on the pilot study on this process, the SSA made the following observations:

> During the project the DDSs reversed the initial cessation determination while developing the cases for hearing in 18 per cent of the cases. Hearing officers reversed the cessation decision in 24 percent of the cases that were forwarded to them by the DDS for a reconsideration hearing. The overall reconsideration level allowance rate during the pilot was 38 percent.[162]

There are three very important points that need to be made about this program. First, unlike ALJs, the hearing officers are totally subject to the instruction and supervision of the SSA and therefore must conform to agency policy and pronouncements regarding not only productivity, but case evaluation procedures and the use or non-use of certain criteria in case determinations. Second, these "face-to-face" hearings are very short, and the hearing officer is given very little time to review the claimant's file and make a determination. Thus, it is doubtful that these hearings will be of sufficient length to allow for a *full* and *fair* hearing that adequately protects the claimant's due process rights. Third, and most important, because this additional step in the appeals process is another burdensome requirement, it may (and in fact to some extent may be intended to) discourage claimants from pursuing their claims to the ALJ. The net result would be that fewer claimants will have the benefit of a full-fledged hearing before an *independent* hearing examiner who also has the responsibility and authority to develop the necessary evidence.

The major dangers of the "face-to-face evidentiary hearing" were summed up by Senator Cohen this way:

> What you're doing is, you're compressing this process. We're going to accelerate the number of cases disposed at the ALJ stage. We're going to compress the evidentiary hearings down to the reconsideration stage, and we're going to crank these people through at a rate of 20 minutes a hearing.
>
> I submit to you that what you're doing in terms of trying to achieve efficiency is, you're going to sacrifice quality of decisions, the very thing we're all saying we want.[163]

IV. EFFECTS OF PRESSURE

Unhappy about their plight, the ALJs have not remained silent but have chosen to fight back. There are two significant examples of the ALJ's efforts to stop the pressures being placed on them by the SSA: *Bono* v. *Heckler*, CA No. 77-0819-CV-W-4, U.S.D.C., Western

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[161] Id. at p.

[162] SSA post-hearing responses to the Subcommittee's additional request. Hearing record p. 262.

[163] Hearing record, p. 40.

District of Missouri, Western Division, and *Association of Administrative Law Judges, Inc.*, v. *Schweiker*, CA. No. 83-0124, U.S.D.C., District of Columbia.[164]

Bono v. *Heckler* was filed in 1977, by Administration Law Judge Charles Bono (now President of the Association of Administrative Law Judges, Inc. (AALJ, Inc.)). In that suit, Judge Bono and several other ALJs alleged that the SSA ALJs were being improperly pressured by the SSA to increase their disposition rate and decrease their allowance rate.[165] Prior to the trial, the parties negotiated a settlement agreement which *inter alia* prohibited the SSA from disseminating ALJ disposition and reversal rates, except as required by law, and issuing directives or memos setting disposition quotas or goals.[166]

In response to the SSA's alleged failure to abide by the terms of the *Bono* settlement,[167] AALJ, Inc. brought suit in *Association of Administrative Law Judges, Inc.* v. *Schweiker* in January, 1983, against the SSA and the MSPB alleging that the SSA was violating the APA by conducting illegal performance ratings of ALJs. The Association also claimed that SSA's actions violated the right of the ALJs to be removed only for "good cause." [168]

The SSA responded to the ALJs' arguments by asserting that the SSA is required by law to process claims promptly [169] and therefore has an obligation to encourage the ALJs to reach and maintain a certain level of production. Furthermore, contrary to the allegations of the ALJs, the SSA said it does not conduct performance ratings on ALJs, and pursuant to the Bellmon Amendment, the SSA has been mandated by Congress to review the decisions of the ALJs with high allowance rates.[170]

Pursuant to pre-trial negotiations, the parties agreed to an order pending the outcome of the litigation.[171] In that order, the SSA agreed to refrain from bringing any new ALJ removal cases before the MSPB based on productivity levels or high allowance rates, going forward with any peer counseling of ALJs, and adding any more judges to the Bellmon Review based on high allowance rates.[172]

In addition, both the SSA and the MSPB filed motions to dismiss. The court granted MSPB's motion and dismissed it from the case,[173] but denied the SSA's motion and ordered the parties to proceed to trial on September 27. 1983.[174]

Some ALJs have taken more personal action, such as opting for early retirement.[175] This option was chosen by one of the witnesses at the hearing, retired Administrative Law Judge Jacob Friedes. Judge Friedes had been an ALJ with the SSA's Office of Hearings and Appeals in Buffalo, New York, for over seventeen years prior to his retirement in December, 1982. Judge Friedes was a very dedicated ALJ whose productivity level was as high as 34 case dispositions per month in 1979, and whose allowance rate prior to 1981 was 48 percent. Describing the events that led up to his decision to retire early Judge Friedes indicated that:

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[164] The suit was resolved prior to litigation pursuant to a settlement agreement (the Bono settlement) which is currently still in effect.

[165] *Bono* v. *Heckler*, Plaintiff's Amended Complaint Filed April 22, 1978. Retained in Subcommittee files.

[166] The *Bono* settlement. Hearing record p. 448.

[167] *AALJ, Inc.* v. *Schweiker*, Plaintiffs' Statement of Points and Authorities in Support of Motion for Preliminary Injunction. Retained in Subcommittee files.

[168] Id.

[169] *AALJ, Inc.* v. *Schweiker*, Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss by Defendants Schweiker, Svahn, Hays and Brown. Retained in Subcommittee files.

[170] Id.

[171] Retained in Subcommittee files.

[172] Retained in Subcommittee files.

[173] *AALJ, Inc.* v. *Schweiker*, Memorandum. Opinion and Order. Filed March 14, 1983, by Judge Joyce Hens Green. Retained in Subcommittee files.

[174] *AALJ, Inc.* v. *Schweiker*, Memorandum. Opinion and Order. Filed June 16, 1983, by Judge Joyce Hens Green. Retained in Subcommittee files.

[175] This option has been chosen by retired ALJ Jacob Friedes, Buffalo, New York, retired ALJ C.J. Occhipinti, Eugene, Oregon, and three other ALJs against whom disciplinary actions had been instituted. See data provided by MSPB. Hearing record, pp. 265–268.

> The events leading up to my retirement centered around OHA pressure concerning production, scheduling of hearings, number of adjournments, reconfiguration, and later reversal rates. Inadequate help was a periodic problem with partial reconfiguration and was later intensified with full reconfiguration. Quotas were euphemistically called goals. Prior to any reconfiguration in the Buffalo office we had a unit or team approach. In the calendar year 1979, I was greatly assisted by Mr. Haydu, my staff attorney, and also my hearing assistant and secretary with decisional typing done by the typing pool, supervised by Mr. Allen. I also did pre-hearing screening of some cases. Under these circumstances, I was able to average 34 dispositions per month. . . . After Mr. Haydu resigned in March 1980 to take a supervisory position in Legal Aid, I had difficulty in securing an equally competent replacement for him. This difficulty was intensified with partial and full reconfiguration.
>
> . . . I was dissatisfied with the case summaries, development, description of issues, pulling of exhibits, and writing in the pools. I therefore found that I had to perform these tasks more and more myself. I was also holding hearings myself to enable my secretary to do the additional development. I had continued working my usual 60-hour week, and I felt I could not work any harder. I finally reached the point where I felt I could not provide a full and complete hearing fair to claimants, government, and taxpayers under these circumstances.
>
> . . . [Subsequently] I was informed by the Chief Judge of OHA in early December 1982 that I was scheduled for Bellmon Review because my reversal rate had exceeded 70 percent for a six-month period. I informed the Chief Judge that I was retiring effective December 31, 1982. He then doubted whether my decisions would be placed under Bellmon Review. My reversal rate for calendar year 1982 was 69.5 percent in comparison to my approximate 48 percent reversal rate for calendar year 1979. I suspect that the increase in my reversal rate in large part was due to the CDI program with its poor evidentiary input and my substantial documentary supplementation.[176]

The sentiments outlined by Judge Friedes were also echoed by Administrative Law Judge C. J. Occhipinti of the Eugene Hearing Office, who also chose to retire early. In a resignation [retirement] letter to Doris Coonrod, Regional Chief ALJ for Region X, Judge Occhipinti made the following statements:

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[176] Hearing record, pp. 81, 82, 86.

> This is to advise you that as of the close of business on June 10, 1983, I am electing to retire from Federal Service. I had hoped to remain several more years, but find that the changes imposed make it impossible to remain and retain my integrity. Recent administrative policies appear certain to reduce the judicial adjudication of claims to fast track clerical automated justice. Perhaps this should be expected in an era of computer games and declining values. I leave with regret and deep disappointment. My association with the Social Security Administration has spanned almost nine years, and I regret the turn that the Agency has taken.
>
> . . . Many of my colleagues have consciously or unconsciously succumbed to the irresponsible demands, possibly in order to preserve their careers, or in some cases, welcoming the reduction in responsibility and effort—by merely checking boxes and producing the ever-increasing numbers demanded by those blinded by ambition and impervious to truth and honesty.
>
> . . . I cannot thus remain associated with this philosophy, as the integrity of the office I hold, as well as my personal values, cannot be diluted, nor will I condone the methods employed to achieve the questionable goals at the expense of deprived litigants, including the raping of the taxpayer, in this process. In all honesty, announcement 318, which presumes to recruit ALJs, should be abolished, or drastically revised.
>
> Again, with deep regret, and great disappointment, I feel it is time to leave what is a well intentioned program which has surrendered integrity for expediency.[177]

The clearest demonstration of ALJ sentiment regarding their situation in the SSDI program was highlighted in a survey done in 1982 by Professor Donna Price Cofer, of Southwest Missouri State University, who surveyed the SSA ALJs for their opinions on their role within the SSA.[178] Almost 70 percent (approximately 500 ALJs) of he ALJs responded, three times that which is normally expected.[179] In responding to the question of whether "tacit agency pressure" was being placed on ALJs by the SSA to reduce their allowance rate, 77.1 percent of the judges agreed that the agency was pressuring them to reduce their allowance rates.[180] And an astounding 75.7 percent felt hat the *quality* of their decisions had been damaged by the SSA's pressure to increase productivity.[181] These results clearly indicated hat the majority of the SSA ALJs feel that they are being pressured by the SSA to decide cases in a certain way and at a faster rate, and hat this pressure is having an adverse effect on the SSDI claimants.

The pressure placed on the ALJs has resulted in a decrease in the ALJ allowance rate and an increase in the ALJ productivity. Over the past year and a half, the ALJ allowance rate has decreased 23 percent,[182] and the ALJ production rate has increased 25 percent.[183] Thus, it appears that the SSA is achieving its objectives. However, the achievement has been at an immeasureable cost to individual lives and to the integrity of the SSDI program.

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[177] Hearing record, p. 348.

[178] At the time that this report was being written, Professor Cofer's report had not yet een copyrighted and was therefore unavailable for detailed and extensive use.

[179] According to Professor Cofer, this was a much larger return than the normally expected 30 per cent for a survey of this nature.

[180] Cofer, ALJ Study, *supra* fn. 85, Section 5, Question 3.

[181] Id. at Question 6.

V. FINDINGS

The principal finding of the Subcommittee is that the SSA is pressuring its ALJs to reduce the rate at which they allow disabled persons to participate in or continue to participate in the Social Security disability program by:

> Focusing its review and study efforts principally on the ALJ allowance rate and ALJs with high allowance rates;
>
> Increasing the rate at which ALJs are expected to decide cases (the disposition rate), thereby reducing the quantity and quality of time that an ALJ has to devote to each case and lessening the opportunity for an ALJ to develop additional evidence which may support an allowance decision;
>
> Reinforcing ALJ conduct which reduces allowance rates and increases disposition rates through memos of praise to and within the field offices for such activity; and
>
> Limiting the decisional independence of the ALJs through the use of Social Security Rulings and a policy of selected non-acquiescence in federal court decisions.

Further, the Subcommittee finds that:

> The SSA views the ALJ allowance rate as the source of the problems in the disability adjudicative process, even though its own initial review in the Bellmon Study has shown otherwise. The SSA has therefore unjustifiably and inequitably focused its efforts on the ALJ allowance rate and ALJs with high allowance rates in such a way as to result in less impartial and fair hearings for some disability claimants.
>
> High ALJ allowance rates are only symptomatic of serious inconsistencies and problems in the disability program. The initial review conducted by the SSA as part of the Bellmon Study concluded that the high rate of allowance decisions by ALJs does not necessarily mean that ALJs are acting in error. ALJs are provided with a better opportunity to fairly determine a claimant's eligibility than the State DDS examiners and are entitled to apply different and more flexible standards in the evaluation process, while DDS examiners must work with limited evidence within the confines of strict agency policy and without the benefit of a personal appearance by the claimant.
>
> The SSA has established explicit production goals for its ALJs and an implied production quota. SSA documents show a production goal of 45 case dispositions per month per ALJ by September 1983. And in view of the SSA's actions and comments, it is

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[182] Based on information provided by the SSA Office of Hearings and Appeals, 1983 computer data, June 1983. Documents retained in Subcommittee files.

[183] Based on information provided by the SSA Office of Hearings and Appeals. See also ALJ and Hearing Office Statistics, FY81 and computer data available from OHA documents.

the Subcommittee's conclusion that an implied minimum quota of 20 case dispositions per month per ALJ is in effect. If an ALJ falls below that level, he or she will be subject to counseling, and if there is no improvement after counseling, it is likely that the SSA will file a complaint for punitive action with the Merit Systems Protection Board.

The proposed format for establishing face-to-face evidentiary hearings at reconsideration, if implemented, may undermine the role of the ALJ in the appeals process by reducing the number of claimants who will be willing to pursue an appeal to the ALJ level by creating yet another obstacle for the adjudication weary disabled claimant to overcome, and thereby substituting a review by an SSA employee who will be subject to the direct control and supervision of the SSA, for review by an independent ALJ.

VI. RECOMMENDATIONS

Based on the above findings, the Subcommittee recommends the following:

All Bellmon Review activity should be discontinued immediately, and the Bellmon Amendment should be repealed. While the amendment was a worthwhile proposal at the time it was passed, the report issued by the SSA in January, 1982, referred to as "The Bellmon Report" fulfilled the mandates of the amendment. It has given Congress and the SSA valuable information about the nature of the problems in the adjudicative process in the disability program and the reasons for the differences between the decisions of the state disability examiners and the ALJs. The appropriate response now is to legislate reform in the adjudicative process. Continued review of ALJs will serve only as a tool of harassment and undesirable decisionmaking pressure.

Any present or future reference, either oral or written, by the SSA as to the desirability of reducing the ALJ allowance rates should be prohibited. Furthermore, while it may be managerially helpful to maintain statistics on the allowance and disposition rates of individual ALJs, the SSA should stop the practice of ranking ALJs on this basis in any internal or external documents.

The SSA should immediately discontinue any further incorporation of POMS into SSRs. All standards for disability evaluation which are to be binding on the ALJs should be made subject to public notice and comment.

The SSA should immediately cease its policy of non-acquiescence in decisions issued by Circuit Courts of Appeal. Both of these recommendations are addressed in legislative language in S. 476, a bill to reform the continuing disability review process, which was introduced by Senators Levin and Cohen of this Subcommittee earlier this year.

The Judiciary Committees of both the House and the Senate should review the propriety and legality of minimal productivity quotas imposed by employer agencies on employee ALJs.

VII. CONCLUSION

The APA mandates that the ALJ be an independent, impartial adjudicator in the administrative process and in so doing separates the adjudicative and prosecutorial functions of an agency. The ALJ is the only impartial, independent adjudicator available to the claimant in the administrative process and the only person who stands between the claimant and the whim of agency bias and policy. If the ALJ is subordinated to the role of a mere employee, an instrument and mouthpiece for the SSA, then we will have returned to the days when the agency was both prosecutor and judge.

The system of administrative law as we know it is a product of much thoughtful consideration and concern for competence and fairness. One key to this process is the ALJ, and, the integrity of the position must therefore be protected.

Chairman PICKLE. All right, Judge Mayhue.

STATEMENT OF FRANCIS MAYHUE, ADMINISTRATIVE LAW JUDGE, OFFICE OF HEARINGS AND APPEALS, FORT SMITH, AR

Mr. MAYHUE. Congressman Pickle, Mr. Anthony, Senator Pryor, we appreciate the opportunity to appear here today.

For the record I would like to submit an affidavit that I filed in our association's lawsuit against the current administration concerning the Bellmon review, which the current administration used as the weapon against the administrative law judges, and in particular the three that are here today.

As judge Thomasson has mentioned and as had been mentioned here today, one of our big problems is what the current administration calls the doctrine of "nonacquiescence". We have a circuit court and a U.S. district court that say we have to weigh and evaluate a claimant's testimony concerning the pain he says he has.

I was doing that, citing the court decisions in my decisions, and on January 28, 1982, they called me to Washington. They sat me down and they said, we don't follow those decisions—you're not to follow them. I said, gentlemen, those judges of which I'm officer of their court, can put me in jail, you all can fire me. What would you do if you were in my position?

We've been threatened, harassed, intimidated, jerked all over the country, punished, and at no time in the history of the Social Security Administration has a decision come down from the Appeals Council that said "Judge Francis Mayhue, you will go to Detroit, MI, and hear one case at Government expense." Never been done before and never been done since—but they did it. To me and to Judge Thomasson. It was done in writing.

The Appeals Council you've been—you've been talking about the Appeals Council and leaving benefits through the AIJ decision. As long as we've got an administration like we have today, that won't work, because they continue to substitute their opinion for ours. And, when my decision is issued they review it in Washington and they—they've never seen the claimant—they've never seen the poor claimant. They substitute their judgment for ours regardless of what we see.

Arbitrary, capricious, insensitive—that's where we are today. Thank you very much.

[The affidavit of Judge Mayhue follows:]

AFFIDAVIT OF FRANCIS MAYHUE, ADMINISTRATIVE LAW JUDGE, FORT SMITH, AR

Comes Francis Mayhue, after being duly sworn upon oath, and states:

1. I am an Administrative Law Judge employed by the Office of Hearings and Appeals, Social Security Administration, Department of Health and Human Services.

2. I am a member of the Association of Administrative Law Judges within the Department of Health and Human Services.

3. In January, 1982. I was summoned to Washington for "continuing education", and while in Washington I was advised by Bill Levere, a management employee of the Office of Hearings and Appeals, that a reversal rate of 45 to 55 percent was acceptable and that the reversal rate of the Fort Smith office, and particularly my reversal rate, was unacceptable.

4. From August 17, 1981, until July 1, 1982, I was under 100 percent review by the Appeals Council. This means that every decision, whether it be an affirmation, reversal or dismissal, was reviewed by the Appeals Council. This was subject to Order

by Chief Judge Philip T. Brown. A copy of Judge Brown's Order is attached as Exhibit 1.

5. On July 1, 1982, I was notified by Judge Brown that I had been removed from 100 percent review by the Appeals Council and placed under "Bellmon Review". A copy of this Order is attached as Exhibit 2. This means that all reversal decisions have been reviewed by the Appeals Council pursuant to Section 304 of PL 96-265, commonly known as the Bellmon Amendment. A copy of this Public Law is attached as Exhibit 3. The Bellmon Amendment provided for ongoing review of decisions by Administrative Law Judges, but the Appeals Council adopted a policy of reviewing only reversal decisions wherein the Administrative Law Judge granted benefits to a claimant as opposed to a denial decision issued by an Administrative Law Judge. I am convinced that all of my reversal decisions have been reviewed by the Appeals Council and my reason for this belief is contained in a memorandum from Louis B. Hays to all Administrative Law Judges, dated September 24, 1982. A copy of this memorandum is attached as Exhibit 4.

This statement is given by me on this 11th day of January, 1983.

FRANCIS MAYHUE,
Administrative Law Judge.

Subscribed and sworn to before me this 11th day of January, 1983.

CATHY A. HICKS,
Notary Public.

My commission expires July 8, 1990.

Refer to: SGA3

Memorandum

Date: JUL 29 1981

From: Office of the Chief Administrative Law Judge

Subject: Appeals Council Review of ALJ Decisions--ACTION

To: Administrative Law Judge in Charge
Administrative Law Judges
Fort Smith Hearing Office

During the visit of the Deputy Chief Administrative Law Judge in December 1980, collectively you advised him that you would consider Appeals Council review of your decisions an appropriate manner in which your adjudicatory practices could be evaluated. The Appeals Council, effective August 17, 1981, will review all decisions of ALJs in the Ft. Smith office.

Effective for decisions issued August 17, 1981 and until further notice you should begin the following procedures to effect this process:

> Forward all (i.e., Dismissals, Affirmations, Partial or Fully Favorable Allowances) claim files with cassettes to:
>
> > Office of Hearings and Appeals
> > Social Security Administration
> > Post Office Box 1207
> > Arlington, Virginia 22210

You can be assured that your decisions will be handled expeditiously and that any delay in effectuating a favorable decision will be held to a minimum.

Philip T. Brown
Philip T. Brown
Chief Administrative Law Judge

Exhibit 2

DEPARTMENT OF HEALTH & HUMAN SERVICES

Refer to SGR2

Memorandum

Date · JUL 01 1982

From: Chief Administrative Law Judge

Subject: Ongoing Review Directed by Section 304(g) of P.L. 96-265 -- ACTION

To: Francis E. Mayhue
Administrative Law Judge
Fort Smith, AR

Phone No: FTS 235-2650

PURPOSE

This confirms the telephone conversation on July 1 when you were notified of new procedures to follow in referring your cases to Central Office for review. Effective July 6 and until further notice, you should forward only your reversal decision cases involving title II and concurrent disability issues to the Office of Appraisal for review under the Bellmon Amendment. All other types of reversal cases, as well as affirmation and dismissal cases should be processed routinely, in accordance with the OHA Handbook instructions.

The following instructions should be followed by your staff in releasing all your favorable title II and concurrent cases involving the issue of disability. These instructions apply only to disability issue reversal cases. If disability was not at issue in the hearing decision, for example, if workmen's compensation offset or entitlement of a dependent child whose entitlement was not contingent on his/her being disabled, etc., was the issue in the decision, that case should not be referred to OHA.

INSTRUCTIONS

① Partially and fully favorable title II and concurrent disability issue cases are to be processed in the normal manner through the issuance and mailing of the hearing decision.

② The case control instructions outlined in the OHA Case Control System Manual for the posting of the HA-670 control card and the SSA-672 coding sheet will be followed in these cases; enter location code 5950 in "CTT" on both the control card and the coding sheet on the 335-action. Location code 5950 will flag the Case Control System that the case has been selected for Bellmon review. (Note: In some concurrent cases, a reversal decision may be issued on only one part. Follow the above instruction for both parts). All cases referred to Central Office for this review, must include the appropriate copies of the HA-670 control card in the claim file(s).

3. Hearing cassettes are to remain with the claim folder in the cassette envelope for all cases referred to Central Office for this review. The cassette(s) are to be placed in the title II folder in concurrent cases. (AMSARS procedures now being piloted experimentally in selected locations will not apply in these instances). The cassette(s) must be sent with the claim file.

4. Routing of title II only cases: A form HA-5051 is to be stapled to the outside of the claim folder directing it to its normal effectuating component. On top of this route slip (HA-5051) to the effectuating component, staple a form HA-505 directing the claim folder to OHA, P.O. Box 1207, Arlington, VA 22210.

5. Routing of concurrent cases: The two claim folders are to be split and set-up for release in the normal manner, with appropriate photocopies placed in the SSI folder. Prepare a form HA-5051 for each folder, directing it to the proper effectuating component, and staple it to that folder. Use rubber bands to keep both the title II and SSI folders together with the title II folder on top for sending to CO. Please do not staple them. Prepare a route slip, form HA-505, directing the combined files to OHA, P.O. Box 1207, Arlington, VA 22210, and staple it on top of the HA-5051 to the effectuating component on the title II file. Release the files together as indicated above to Central Office. Further routing to the appropriate effectuating components will be done, based on your pre-prepared HA-5051 route slips.

6. The person(s) in the office responsible for releasing the folders will complete a HO/ALJ Report (see copy attached) for each case or group of cases he/she is referring to OHA. Care should be taken to make sure that these reports are legible. Please supplement the attached forms with photocopies until you receive a printed supply. The HO/ALJ Report is to be released at the same time the folder or folders are released. The HO/ALJ Report is to be mailed to: OHA, Office of Appraisal, Attn: Margie David, P.O. Box 1207, Arlington, VA 22210. The envelope should carry a DO NOT OPEN IN MAILROOM annotation. A HO/ALJ Report should accompany every case or group of cases mailed to CO.

7. All applicable cases and HO/ALJ Reports referred to above must be forwarded immediately upon release of the decision. If several decisions are released at the same time, then those cases may be grouped for mailing on the same day. Otherwise, do not hold a case for group mailing to Central Office, send it alone with a report.

8. Post decision correspondence is to be handled in accordance with present instructions.

I appreciate your cooperation in this matter. If you have any questions regarding these instructions, please contact Margie David at FTS 235-1814.

Philip T. Brown

Attachment

cc:
ALJIC
RCALJ

Exhibit 3

(d) In any case in which any person who as of December 31, 1978, is entitled to receive pension under section 521, 541, or 542 of title 38, United States Code, or under section 306(b) of the Veterans' Pension Act of 1959, elects (in accordance with subsection (a)(1) or (b)(2), as appropriate) before October 1, 1979, to receive pension under such section as in effect after December 31, 1978, the Administrator of Veterans' Affairs shall pay to such person an amount equal to the amount by which the amount of pension benefits such person would have received had such election been made on January 1, 1979, exceeds the amount of pension benefits actually paid to such person for the period beginning on January 1, 1979, and ending on the date preceding the date of such election.

(e) Whenever there is an increase under subsections (a)(3) and (b)(4) in the annual income limitations with respect to persons being paid pension under subsections (a)(2) and (b)(3), the Administrator of Veterans' Affairs shall publish such annual income limitations, as increased pursuant to such subsections, in the Federal Register at the same time as the material required by section 215(i)(2)(D) of the Social Security Act is published by reason of a determination under section 215(i) of such Act.

* * * * * * *

[*Internal References.*—Social Security Act § 1133(a)(1) cites § 306 of the Veterans' and Survivors' Pension Improvement Act of 1978 and Social Security Act § 215(i)(4) has a footnote referring to this public law.]

SOCIAL SECURITY DISABILITY AMENDMENTS OF 1980

P.L. 96-265, Approved June 9, 1980 (94 Stat. 441)

Sec. 1. [42 U.S.C. 1305 note] This Act may be cited as the "Social Security Disability Amendments of 1980".

* * * * * * *

Sec. 201. * * *

(e) [42 U.S.C. 1382h note] The Secretary shall provide for separate accounts with respect to the benefits payable by reason of the amendments made by subsections (a) and (b) so as to provide for evaluation of the effects of such amendments on the programs established by titles II, XVI, XIX, and XX of the Social Security Act.

* * * * * * *

Sec. 304. * * *

(g) [42 U.S.C. 421 note] The Secretary of Health and Human Services shall implement a program of reviewing, on his own motion, decisions rendered by administrative law judges as a result of hearings under section 221(d) of the Social Security Act, and shall report to the Congress by January 1, 1982, on his progress.

* * * * * * *

(i) [42 U.S.C. 421 note] The Secretary of Health and Human Services shall submit to the Congress by July 1, 1980, a detailed plan on how he expects to assume the functions and operations of a State disability determination unit when this becomes necessary under the amendments made by this section, and how he intends to meet the requirements of section 221(b)(3) of the Social Security Act. Such plan should assume the uninterrupted operation of the disability determination function and the utilization of the best qualified personnel to carry out such function. If any amendment of Federal law or regulation is required to carry out such plan, recommendations for such amendment should be included in the report.

* * * * * * *

TIME LIMITATIONS FOR DECISIONS ON BENEFIT CLAIMS

Sec. 308. [42 U.S.C. 401 note] The Secretary of Health and Human Services shall submit to the Congress, no later than July 1, 1980, a report recommending the establishment of appropriate time limitations governing decisions on claims for benefits under title II of the Social Security Act. Such report shall specifically recommend—

(1) the maximum period of time (after application for a payment under such title is filed) within which the initial decision of the Secretary as to the rights of the applicant should be made;

Exhibit 4

[illegible] SGR1

Memorandum

Date SEP 24 1982

From Associate Commissioner
Office of Hearings and Appeals

Subject Description of the Bellmon Own-Motion Review Program — INFORMATION

To All Administrative Law Judges

The purpose of this memorandum is to provide you with an overview of the Bellmon review as it is now functioning and the results of the review.

The ongoing review of hearing decisions under the Bellmon Amendment is intended to promote greater consistency and accuracy by identifying and correcting those decisions that do not comply with the applicable provisions of the law, regulations and Rulings. Under the Bellmon review program, the Appeals Council, on its own motion, formally reviews ALJ decisions that do not appear to be correct and, where the decision is incorrect, either reverses the ALJ's decision or remands the case to the ALJ for further proceedings. (For a more complete description of the procedures used by the Appeals Council, see Social Security Ruling 82-13 published in the January 1982 compilation of the Rulings.) This program results from Congressional concerns about the high overall percentage of cases allowed at the hearing level, the wide variance in allowance rates among individual ALJs, the fact that only ALJ decisions denying benefits were generally subject to further review, and the inconsistencies noted in decision-making at the different adjudicatory levels.

The initial phase of the pre-effectuation ongoing review program, which started October 1, 1981, was limited to approximately seven and one-half percent of all Title II and Title II/XVI concurrent disability allowance decisions issued by a group of hearing offices (HOs) and individual ALJs selected on the basis of allowance rates of 70 percent or higher, and 74 percent or higher, respectively. Allowance rates were used as the basis for selecting the initial review group, both because of Congressional intent and because studies had shown that decisions in this group would be the most likely to contain errors which would otherwise go uncorrected. Rather than reviewing all disability allowance decisions produced by these HOs/ALJs, a decision was made to review half of the group's allowance decisions in order to increase the total number of ALJs under review and thereby enhance the overall effectiveness of the review. The initial selection procedure was designed to yield a group of hearing decisions for review which were likely to be among the most error prone and thus to make the most efficient use of resources while correcting the greatest number of faulty hearing decisions.

On April 1, the Bellmon review was enlarged to include 15 percent of ALJ disability allowance decisions, and the case selection criteria for the Bellmon program were redesigned and expanded. Under this expansion, the group of ALJs selected on the basis of high allowance rates is just one of several components of the review. A national random sample of ALJ allowances, without regard to any ALJ's allowance rate, now accounts for 25 percent of the total reviewed cases. The expanded Bellmon review also includes cases identified and referred to the Appeals Council by the Office of Disability Operations (ODO). In addition a review of decisions from new ALJs is included in the program. One other change has been to remove entire hearing offices from the review.

The following is a summary of the four aspects of the Bellmon review:

o Random Sample - A national random sample of allowance decisions accounts for 25 percent of the Bellmon cases. These cases are randomly selected and sent to OHA from ODO prior to effectuation. Data from this part of the Bellmon review is especially important as a baseline for comparison with information from the review of individual ALJs. It is also an important means of providing feedback on the quality of decisions to all ALJs and will aid in identifying areas where policy clarification or training is needed.

o New ALJs - The decisions from new ALJs are reviewed until it is determined that each ALJ's work is satisfactory. The review of new ALJs is useful in determining the effectiveness of the ALJ training program, and it enables us to take remedial action, if necessary, at the most opportune stage in an ALJ's development.

o ODO Protests - Disability examiners in ODO are reviewing a sample of ALJ allowances prior to effectuation as part of a pilot project. If a disability examiner believes there is a substantive disability issue in the case which does not comport with the law and regulations, the claim file is referred to OHA and made part of the Bellmon review. The Appeals Council follows standard procedures in deciding whether or not to take own motion.

o Individual ALJs - During the initial phase of the ongoing review, data were collected on own motion rates (the frequency that the Appeals Council takes action to correct an ALJ decision). Based on these data, ALJs are divided into four groups — those on 100 percent review, 75 percent review, 50 percent review and 25 percent review. Generally, as ALJs' own motion rates decline, their level of review also decreases. Continuing modifications are made in the group of ALJs under review and the level of review for individual ALJs. One hundred-six ALJs are included in this portion of the Bellmon review.

Although the allowance rate is the basis for selection of individual ALJs for that portion of the review, this factor receives no consideration in determining whether to remove ALJs from review. Decisional accuracy is the sole criterion, which we have defined as a five percent own motion rate for three consecutive months. In other words, an ALJ with an extremely high allowance rate could ✓ be removed from the Bellmon review if his or her decisions are correct.

Through September 1, we have reviewed 10,560 allowance decisions. The own motion rate for all of these cases is 12.1 percent. However, the rates vary significantly depending on the category of the review. The highest own ✓ motion rate, 50.7 percent, exists in the ODO protests. The next highest category is the group of individual ALJs, 14.2 percent. These rates are contrasted by the rates for the new ALJs, 7.5 percent and the random sample, 5.7 percent.

While the figures cited above are based on the cases where the Appeals Council has completed its action, there are a substantial number of cases pending where the Appeals Council's support staff has recommended that the Council take corrective action and such action has not yet been taken. Since our experience has shown that about 95 percent of these recommendations ultimately result in either reversals or remands at the AC level, it is noteworthy that the overall "recommended" own motion rate is approximately six and one-half percent higher than the actual own motion rate.

In addition to own motion rates, we also maintain information regarding the overall percentage of defective cases. A case is considered defective if the decision contains some type of deficiency — improper basis for disability conclusion, failure to follow sequential evaluation, improper questioning of an expert witness, etc. — yet reaches an ultimately correct conclusion that the claimant is disabled. Through September 1, the overall defect rate was 47.6 percent, with the various category percentages as follows: ODO protests - 91.0 percent; random sample - 52.7 percent; individual ALJs - 49.7 percent; and new ALJs - 30.5 percent. Although the majority of these decisions did not contain deficiencies so severe that an own motion action was recommended, the Social Security Regulations are not being correctly applied in many instances.

An essential requirement to ensure the success of the Bellmon review program is to provide a companion system for providing feedback on the results of the review. While the information we obtain from the review is very helpful in guiding our training and continuing education efforts, I believe there must be a more individualized process for those ALJs in the individual category. Such a system is now being implemented. The purpose of the feedback system is to advise affected ALJs of decisional weaknesses and to provide a mechanism for achieving long term improvement.

Under the first stage of the feedback system the Chief Administrative Law Judge (CALJ) will send a memorandum to the appropriate Regional Chief Administrative Law Judge (RCALJ) enclosing a brief outline of the particular problems found in the decisions of that ALJ. Also enclosed will be summaries of several cases reviewed by the Appeals Council on its own motion with supporting documentation. The RCALJ, together with Deputy Chief Administrative Law Judge Irwin Friedenberg on occasion, will meet with the ALJ involved to discuss the problems reported and review steps that can be taken to improve the accuracy of his or her decisions.

Thereafter, a further review of the ALJ's decisions will be undertaken for three months to determine if there has been improvement. If no change has occurred the CALJ may either request additional counselling through the RCALJ or authorize special training in the region or in Central Office. If there is still no measurable improvement other steps will be considered.

Initially, because of staffing limitations, feedback will be limited to those individual ALJs who are included in the 100 percent review group. As the system progresses, all ALJs remaining in the individual group will be included in this process.

Louis B. Hays

AFFIDAVIT

Comes Francis Mayhue, after being duly sworn upon oath, and states:

1. I am an Administrative Law Judge employed by the Office of Hearings and Appeals, Social Security Administration, Department of Health and Human Services.

2. I am a member of the Association of Administrative Law Judges within the Department of Health and Human Services.

3. The Detroit, Michigan, and Southfield, Michigan, hearing offices had a critical "backlog" of cases in August and September of 1981, and the administration sought "volunteer Judges" from the various Regions of the Country to help reduce said "backlog". The two mentioned hearing offices in Michigan are in Region V, (Chicago region) and affiant's office is in Region VI (Dallas region). Therefore, this was an "out of Region trip".

4. It was then the policy of this administration, according to a memorandum from Chief Administrative Law Judge Phil Brown, dated September 25, 1981 (Exhibit No. 1, attached hereto), that overnight travel within the Region could and would be authorized only if twenty-five (25) cases were scheduled and heard in one (1) week; that overnight travel outside the Region would be authorized if thirty (30) cases were scheduled and heard in one (1) week or fifty (50) cases were scheduled and heard within two (2) weeks.

5. Sometime in July or August of 1981, I volunteered to accept a fifty (50) case docket in the Detroit, Michigan, hearing office and, soon thereafter, I received the fifty (50) cases. The cases were then prepared for hearing by my staff and I proceeded to review the cases prior to setting them for hearing. My review of the cases revealed that twenty-five (25) of the cases could be disposed of without a hearing. Some were written "on-the-record" without a hearing and some were "dismissed" due to some procedural or jurisdictional deficiency. Thereafter, twenty-five (25) cases were scheduled for hearings and were heard by affiant on October 20, 21, and 22, 1981. A copy of the Itinerary and Schedule of Hearings is made a part of this affidavit as "Exhibit No. 2".

6. The hearing and non-hearing cases were disposed of in a normal and customary manner by affiant.

7. On January 4, 1982, I received an Order of the Appeals Council in the case of *Robert H. Choiniere, 317-36-5768.* (See Exhibit No. 3.) I had rendered a favorable "on-record" decision in this case on October 29, 1981, with the proper "Memorandum for the file", and said decision is attached hereto as "Exhibit No. 4". The Appeals Council Remand Order directed affiant to schedule a hearing in Southfield, Michigan, for two (2) reasons:

(1) The claimant did not waive his right to appear and testify at an oral hearing and in the opinion of the Appeals Council, has not received a decision consistent with the Regulations which implement the Social Security Act. and

(2) The Administrative Law Judge's findings are not supported by substantial evidence. (See Exhibit 3, page 2)

8. The procedure used by the Appeals Council as set forth in paragraph seven (7) above was unprecedented in the Office of Hearings and Appeals, in that I had never heard nor seen a situation wherein an Administrative Law Judge was ordered to travel from one Region to another for the purpose of hearing one (1) case. Accordingly, I requested a special travel order from the Associate Commissioner on January 5, 1982, and my request is attached hereto as "Exhibit No. 5". The Administrative Law Judges in Office of Hearings and Appeals had previously advised that due to the economic conditions prevailing at that time and the "tight budget" in the Office of Hearings and Appeals, travel by Administrative Law Judges and their staff would be extensively curtailed. The Appeals Council Remand seemed to be contrary to the policy concerning travel within the Office of Hearings and Appeals.

9. On February 22, 1982, the Associate Commissioner replied to my Memorandum of January 5, 1982, and his reply is attached hereto as "Exhibit No. 6". This memorandum seemed to be highly questionable to the affiant, since it was the then policy of Office of Hearings and Appeals that over-night travel would not be authorized unless at least thirty (30) cases were scheduled. (Exhibit No. 1.)

10. Affiant waited until mid-April, 1982, and then contacted the Appeals Council and was advised that they had completed review of all my Michigan cases and I should proceed to schedule the five (5) cases that had been remanded. The language in the other four (4) Remand Orders was substantially the same as in the *Choiniere* case.

11. Judge Jerry Thomasson of the Ft. Smith, Arkansas, office has "volunteered" and he, too, received and disposed of fifty (50) Detroit, Michigan, cases within the same time frame as affiant. He had received less than ten (10) Appeals Council Re-

mands and as of mid-April was advised to proceed to schedule the same in Detroit, Michigan. Since there were no more than fifteen (15) cases to be heard, affiant and Judge Jerry Thomasson contacted the regional Chief Judge and requested that one or the other be permitted to assign the out of Region cases to the other so that only one (1) Administrative Law Judge would travel to Detroit, Michigan, and thereby cut the cost to the Government at least in half. The response was "no", we both had to go. Accordingly, we each scheduled hearings in Detroit, Michigan.

12. On May 3, 1982 affiant and Judge Thomasson left Ft. Smith, Arkansas, and traveled to Detroit, Michigan. We traveled via the same airplane, rode in the same taxis, stayed in the same hotel, held hearings on the same day (May 4, 1982), in the same building (Patrick J. McNamara Federal Building) and returned to Ft. Smith, Arkansas via the same air transportation. The total expense for both of us was $1,418.45. Either one of us could have disposed of the other's docket with ease and efficiency.

13. Prior to this incident, affiant believes, to the best of his knowledge, that it was and is the established policy of the Office of Hearings and Appeals that a Remand in a case heard out of the Region is routinely returned to the principal hearing office for reassignment to another Administrative Law Judge. I have worked for this agency for nearly twelve (12) years and have traveled all over the continental United States, hearing cases. I have never known nor heard of the Appeals Council specifically directing a Judge to return to a remote, out of region, hearing site to hear five (5), much less one (1) case.

14. Affiant verily believes that the sole and only purpose of the conduct of the Administration in this instance was to either punish, harass, and/or intimidate the undersigned and the same was, and is, improper treatment of any Administrative Law Judge. Furthermore, the actions of the Administration violated it's own policy and was contrary to fiscal responsibility for which they should be accountable to their superiors.

Dated this 21st day of March 1983.

FRANCIS MAYHUE,
Administrative Law Judge.

Subscribed and sworn to before me this 21st day of March, 1983.

CATHY A. HICKS,
Notary Public.

My commission expires July 8, 1990.

[illegible] OF HEALTH & HUMAN SERVICES

OHA OKLA CITY OK SEP 2 9 '98.

Memorandum

Judge Mart

[illegible]

Office of the Chief Administrative Law Judge

Assignment of Travel Cases--Proposed Amendment to Item No. 5 of the Bono Settlement

Regional Chief Administrative Law Judges
Administrative Law Judges in Charge
Administrative Law Judges

Item No. 5 of the settlement in the Bono case provides:

> "OHA shall amend its travel policy presently set forth in SSA, ADS Guide OHA.f:240-54 (dated 4/30/79), to omit mention of any minimum number of cases which must be set to justify travel for hearing trips in Sections II.B.1 and II.C.4 of that policy."

Unfortunately, the absence of any standard number of cases has resulted in poor workload management and, in instances, unnecessary multiple trips to the same hearing site. Lack of a minimum standard has caused many ALJICs problems in attempts to effectively direct the operation of the hearing office and our increasing workload. We also face the prospect of a continuing large number of interregional case transfers, which operation is becoming more difficult and less effective without minimum standards.

Accordingly, we are proposing to amend the ADS Guide in the following ways:

1. For service area and intraregional travel, the minimum number of cases to be scheduled per trip shall be 25. However, the ALJIC, in writing, may approve itineraries for a lesser number where to do so clearly is in the interest of service to the public and/or effective workload management.

2. For interregional travel, the minimum number of cases to be scheduled shall be (i) 50 cases for a two-week period or (ii) 30 cases for a one-week period. The RCALJs of the affected regions, with the written concurrence of the CALJ, may make exceptions to this standard for the same reasons as stated in "1" above.

EXHIBIT NO. 1 (2) PAGES

The issue of reviving a minimum number of cases to be scheduled on hearing trips was discussed at the last ALJ Policy Council. Pursuant to the provisions of the Bono Settlement, this modification will not be made without consultation also with the ALJ Association and the ALJ Corps. A separate memorandum has been sent to the President of the ALJ Association asking that body to comment on this proposal. Any ALJ who wishes to make comments about the proposal should do so [illegible] by October 16, 1981.

Philip T. Brown
Philip T. Brown
Chief Administrative Law Judge

ITINERARY AND SCHEDULE OF HEARINGS

ALJ Francis Mayhue
ADMINISTRATIVE LAW JUDGE

HEARING ASSISTANT

October
MONTH

1981
YEAR

EMERGENCY ADDRESS OR PHONE

TIME	CLAIMANT	Account Number	Type of Case	VE, MA, and/or Atty	Place of Hearing Bldg. & Room No.
9:00 AM	Douglas A. Cole	371-64-2137	DIB	Wm. Crawforth, Atty.	New Federal Bldg., Room 430
9:30 AM	Ernest L. Ross	365-38-3341	DIB (Cess.)	Wm. Crawforth, Atty.	
10:00 AM	Dorothy Byrd	424-44-4308	DIB	Wm. Crawforth, Atty.	
~~10:30 AM~~	~~Nardine Martin~~	~~432-48-7247~~	~~SSI~~	--	
11:00 AM	Billy W. Cagle	411-74-2200	DIB/SSI	--	
1:00 PM	Marie A. Parks	374-38-5804	DIB/SSI	Harold Silverstein, atty	
1:30 PM	Robert E. Jones	364-46-0525	DIB/SSI	--	
2:00 PM	John S. Shuryan	363-28-8028	DIB	Sam W. Thomas, Atty.	
2:30 PM	Willie McClain	425-92-7812	DIB	Patrick F. Carron, Atty.	
3:00 PM	Ethel Steele	342-22-8845	DIB/SSI	--	
3:30 PM	Nadine Martin	432-48-7247	SSI		
9:00 AM	Grady Stevenson	234-56-1404	DIB		
9:30 AM	Minnette Dustman	385-54-0741	DIB/SSI	Norman Robiner, Atty.	
10:15 AM	Robert Hopper	362-56-6777	DIB/SSI (Cess.)	Ronald Maister, Atty.	
11:00 AM	Willie Lawler	365-30-3041	DIB/SSI	--	
11:30 AM	Mary Barnum	427-74-1146	DIB/SSI (Cess.)	--	
1:00 PM	Joseph A. Tiseo	377-44-6024	DIB	Michael Mazur, Atty.	
1:45 PM	Luigi Marazita	085-46-7763	DIB/SSI	Elaine Eizelman, Atty.	
2:30 PM	Virginia Skiba	377-20-6434	DIB/SSI	--	
3:00 PM	Leonard Greyson	381-14-0604	DIB	--	
3:30 PM	Neaphoyd Hughes	433-50-3605	SSI	--	
9:00 AM	Clemma Hurst	425-84-6792	SSI	--	
9:30 AM	Samella Lewis	486-20-5645	RSI	Jonathan Walker, Atty.	
10:15 AM	Leodies White	439-58-8386	DIB	Frank Krolczyk, Atty.	
11:00 AM	Robert Dybowski	376-20-9231	DIB	Thomas Miller. Atty.	
10:30	Violet Schaffer	379-40-6430	DIB	Daniel M. Rhode	

SHEET NO. 2 1 210

ITINERARY AND SCHEDULE OF HEARINGS*

[illegible] Mayhue
ADMINISTRATIVE LAW JUDGE

Gloria Donahue
HEARING ASSISTANT

May
MONTH

1982
YEAR

EMERGENCY ADDRESS OR PHONE
313-226-6007 (Commercial)
313-226-6180 (SSI)
226-6007 (FTS)

DATE	TIME	CLAIMANT	Account Number	Type of Case	VE, MA, and/or Atty	Place of Hearing Bldg. & Room No.
		APPEALS COUNCIL REMANDS				Patrick J. McNamara Federal Building 4th Floor, Room 430 477 Michigan Avenue Detroit, MI
[illegible]	9:00	CHOINIERE, Robert	317-36-5768	DIB	William Crawforth, Atty	
	10:00	NORMAN, Earthalyn	566-38-3314	DIB		
	11:00	GREGORY, Shirley	386-52-0552	DIB	Lawrence Halman, Atty.	
	1:00	RUMPH, Mary	423-62-8116	SSI	O. O. Wright, Atty.	
	2:00	GRAY, Willie	426-58-0578	DIB		

DEPARTMENT OF HEALTH & HUMAN SERVICES
Social Security Administration

Office of Hearings and Appeals
PO Box 2518
Washington DC 20013

Refer to:
SGC
371-36-5768

SRA FORT SMITH JAN 04 1982

December 23, 1981

Mr. Robert E. Choiniere
12758 Promenade
Detroit, Michigan 48213

Dear Mr. Choiniere:

There is enclosed herewith a copy of the Order of the Appeals Council remanding your case for further proceedings. We believe the order is self-explanatory.

You will be notified in due course of further action on your case.

Sincerely yours,

/S/

Burton Berkley
Member, Appeals Council

Enclosure

cc:
Mr. William Crawforth
Attorney at Law
Detroit, Michigan 48226

Appeals File
DO, East, Detroit, MI
✓ALJ, Mayhue, Fort Smith, AR
RCALJ, Chicago

EXHIBIT NO. 3 - (4) PAGES

Form HA-L7-U8 (6-81)
Prior editions may be used until supply is exhausted

DEPARTMENT OF
Health and Human Services
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

ORDER OF APPEALS COUNCIL

REMANDING CASE TO ADMINISTRATIVE LAW JUDGE

In the case of	Claim for
Robert H. Choiniere (Claimant)	Period of Disability and Disability Insurance Benefits
(Wage Earner) (Leave blank if same as above)	371-36-5768 (Social Security Number)

Pursuant to authority granted under section 404.969 of Social Security Administration Regulations No. 4 (20 CFR 404.969), the Appeals Council, on its own motion, has decided to review the administrative law judge's decision issued on October 29, 1981.

In a statement in support of his on-the-record decision which found the claimant "disabled" beginning March 3, 1977, a copy of which is enclosed, the administrative law judge summarized portions of the medical evidence and concluded that the claimant's impairment met in severity Listing 11.02A and B (Appendix 1 to Subpart P of Regulations No. 4).

Section 404.1525 provides, in pertinent part, that an impairment is not considered to be one listed in Appendix 1 solely because it has the diagnosis of a listed impairment but that it must (emphasis added) have the findings shown in the Listing of that impairment. In accordance with section 404.1526, a finding that an impairment equals the severity of a listed impairment requires a showing of medical findings at least equal in severity and duration to the listed findings. A review of the record in this case pertinent to the claimant's medical condition since March 1977 including hospital records, a report dated April 30, 1981, from his treating physician and the reports of consultative examinations in April 1981 and May 1981, does not reveal an impairment which lasted for a period of 12 continuous months attended by the signs, symptoms and laboratory findings required by section 11.02A and B of the medical Listings or which was manifested by medical findings of equal severity.

The record shows that the claimant has a medical history of left-sided cerebrovascular accident and seizure disorder. Although he was hospitalized for 7 days in September 1978 after experiencing an apparent grand mal seizure, the hospital records indicate he responded satisfactorily on drug therapy and a report from his attending physician in

April 1981 indicated that the claimant had not experienced any seizure pattern for almost one year. A consultative examination report dated April 16, 1981, described the claimant as oriented in all 3 spheres with no evidence of any speech deficit. Right and left hand grasp was normal and the claimant's gait was also described as normal. Range of motion in the upper and lower extremities was noted to be within normal limits and no neurological deficit of any of the extremities was elicited. Similarly, a consultative mental status evaluation report dated May 1, 1981, described the claimant as oriented in all spheres and exhibiting a spontaneous stream of mental activity with no indication of any significant loss of memory. The diagnostic impression was a possible mild organic brain syndrome secondary to a history of seizure disorder, cerebrovascular accident and encephalitis. In the instant case, the medical record does not establish the presence of a severe convulsive disorder attended by persistent medical findings which meet or equal the severity of the listed findings in section 11.02A and B of the Listing of Impairments. Thus, the administrative law judge, by concluding that the claimant's impairment met medical Listing 11.02A and B, has not properly applied the provisions of section 404.1525 of the Regulations.

The claimant did not waive his right to appear and testify at an oral hearing and in the opinion of the Appeals Council, he has not received a decision consistent with the Regulations which implement the Social Security Act. Further, the administrative law judge's findings are not supported by substantial evidence. Accordingly, the Council vacates the hearing decision and, under authority of section 404.977, remands this case to Administrative Law Judge Francis Mayhue for further proceedings.

The administrative law judge shall schedule a hearing to be held in the Southfield, Michigan Hearing Office and shall give reasonable notice to the claimant of the time and place of the hearing and the issues to be determined in accordance with the law and regulations. The claimant and his representative shall be afforded adequate opportunity to submit further evidence as well as oral argument in support of his claim. Additionally, the administrative law judge shall take such further action that may be necessary to complete the administrative record.

Upon completion of all proceedings, the administrative law judge shall prepare a recommended decision containing a sequential evaluation of the evidence of record and shall recommend corresponding findings in accordance with section 404.1520 of the Regulations. The recommended decision shall be returned to the Appeals Council for its decision. The claimant and his representative shall be given the opportunity to file with the Appeals Council, within 20 days from the date of the notice of the recommended decision, written statements of exceptions and comments as to applicable facts and law. After the 20-day period has expired, the Appeals Council will review the record and issue its decision.

APPEALS COUNCIL

Burton Berkley
Burton Berkley, Member

Richard F. Brodsky
Richard F. Brodsky, Member

Date: December 23, 1981

TRANSMITTAL OF DECISION OR DISMISSAL BY ADMINISTRATIVE LAW JUDGE

TO: 1. ~~OHA, WASHINGTON, D.C. 20013~~
~~(Check appropriate block)~~
☐ ~~Attn: Docket and Files Branch, P.O. Box 2518~~
☐ ~~Attn: Division of Civil Actions, P.O. Box 2931~~
☐ ~~Attn: Division III, OAO, P.O. Box 2518~~

2. (Claims Processing Component)
ODO, DBS
P. O. Box 17096
Baltimore, MD 21241

FROM: (ALJ's Name and Full Office Address)
ALJ Francis Mayhue
OHA, Rm. 203, 616 Garrison
Fort Smith, AR 72901

(Code of HO servicing Clmt's Residence) 5058

ATTACHMENTS: (Check appropriate blocks)

☑ DECISION
☐ RECOMMENDED DECISION
☐ DISMISSAL
☐ EFFECTUATION OR FURTHER ACTION NECESSARY

DATE October 29, 1981

Social Security Number 317-36-5768

Claimant Robert H. Choiniere

Wage Earner (Leave blank in Title XVI Cases or if name is same as above)

Type of Claim DIWC

FOR CO, OHA, USE ONLY
☐ FORWARDED FOR EFFECTUATION
☐ CLAIM FILE FORWARDED

(Section) (Initials) (Date)

☑ CLAIM FILE
☐ OTHER (Describe)

CHECK ONE OR MORE IF APPLICABLE:

☐ 1. File contains an unadjudicated application dated for
☐ 2. Possible rehabilitation services.
☐ 3. $100 not involved. Please note additional evidence submitted for YOUR consideration.
☐ 4. Annual report of earnings in file requires determination as to deductions for period subsequent to that before ALJ.
☐ 5. Exhibit No. should be returned to the claimant upon completion of the final action on the claim.
☐ 6. Favorable decision—reopening of prior decision is within the jurisdiction of the Appeals Council.

REMARKS: On record decision.

Attorney representation.

FORM HA-5051-U3 ([illegible]
(Formerly HA-505-1)
Prior editions may be used.

ADMINISTRATION LAW JUDGE

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

FURTHER ACTION
NECESSARY

Name and Address of Claimant:
Mr. Robert E. Choiniere
12758 Promenade
Detroit, MI 48213

NOTICE OF FAVORABLE DECISION
PLEASE READ CAREFULLY

The enclosed decision is favorable to you, either wholly or partly. If you are satisfied with the decision, there is no need for you to do anything at the present time. Further action on the decision will proceed automatically.

If you disagree with the decision, you have the right to request the Appeals Council to review it within 60 days from the date of receipt of the notice of this decision. It will be presumed that this notice is received within 5 days after the date shown below, unless a reasonable showing is made otherwise. You (or your representative) may file a request for review at your local social security office or at the hearing office, or you may write or telephone these offices indicating your intent to request review. You may also submit a written request for review directly to the Appeals Council, Office of Hearings and Appeals, SSA, P.O. Box 2518, Washington, D.C. 20013.

The Appeals Council may, on its own motion, within 60 days from the date shown below, review the decision, which could possibly result in a change in the decision. (20 CFR 404.969 and 416.1469). After the 60 day period, the Appeals Council generally may only reopen and revise the decision on the basis of new and material evidence, or if a clerical error has been made as to the amount of the benefits or where there is an error as to the decision on the face of the evidence on which it is based. (20 CFR 404.988 and 416.1488; 42 CFR 405.750 and 405.1570). If the Appeals Council decides to review the enclosed decision on its own motion or to reopen and revise it, you will be notified accordingly.

Unless you timely request review by the Appeals Council or the Council reviews the decision on its own initiative, you may not obtain a court review of your case (section 205(g), 1631(c)(3), or 1869(b) of the Social Security Act).

This notice and enclosed copy of
decision mailed
October 29, 1981

cc:
Name and Address of Representative:
Mr. William Crawforth
Attorney at Law
3900 City National Bank Bldg.
Detroit, MI 48226

EXHIBIT NO. 4 (5) PAGES

HA-L502-U6 (10/80) (Formerly HA-502)
DESTROY OLD STOCK

ADMINISTRATIVE LAW JUDGE

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS

FURTHER ACTION
NECESSARY

DECISION

In the case of

Robert H. Choiniere
(Claimant)

(Wage Earner) (Leave blank if same as above)

Claim for
Period of Disability and
Disability Insurance Benefits

317-36-5768
(Social Security Number)

This case is before me upon a timely request for hearing filed by the claimant, who is dissatisfied with the determination disallowing an application for a period of disability and for disability insurance benefits under sections 6(i) and 223, respectively, of the Social Security Act (42 U.S.C. 416(i) and 423).

In view of my conclusion, which is wholly favorable to the claimant, recitation of the evidence is unnecessary.
This decision is being written on the record without a hearing.
After careful consideration of all the evidence of record, I find that the disability earnings requirements are met; and that beginning on **March 3, 1977**, the claimant was under a "disability" as that term is defined in the Social Security Act, and that such disability has continued up to and through the date of this decision.

It is the decision of the undersigned that the claimant, based on the application filed on **March 16, 1981**, is entitled to a period of disability, commencing on **March 3, 1977** and to disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act.

Date: **October 29, 1981**

Francis Mayhue
Administrative Law Judge

HA-5141-U7 (11/78) (Formerly HA-514.1)

ADMINISTRATIVE LAW JUDGE

Francis Mayhue, ALJ
OHA, Fort Smith, AR

Robert H. Choiniere
317-36-5768

CLAIM FOR: POD AND DIB

MEMORANDUM FOR THE FILE

The claimant is 43 years old with a twelfth grade education and work experience as a cement contractor in construction. He alleged disability due to seizure disorders.

Of record is a psychiatric report of Dr. Imam B. Khan which revealed a diagnostic impression of seizure disorder by history, encephalitis, CVA; and possible mild organic brain syndrome secondary to seizure disorder. Prognosis was guarded to unsatisfactory.

Dr. Hugh W. Henderson stated in his report of April 30, 1981 that the claimant has been under his care since 1977 when he was admitted to the hospital with sudden convulsive seizures. He had a definite left-sided hemiperesis and underwent cerebral angiography which revealed developmental anomalies in the circle of Willis, namely arteriovenous malformation in the right cerebral area. This resulted in a definite weakness of the left arm and leg and has resulted in periodic grand mal seizures and also some evidence of mental retardation evidenced by poor memory, difficulty in concentration, inability to carry through complete processes, and inability to complete tasks effectively that required a certain amount of concentration. Physical examination showed markedly hyperactive reflexes on the left side of the body with poor proprioception, particularly of the left upper extremity. For some time he has been taking Membral, 32 mg. three times daily, and Dilantin, 100 mg, four times a day. Dr. Henderson stated that there has been a marked deterioration and he feels that the claimant is certainly unemployable and certainly would not respond to any form of rehabilitaton at this time.

Mr. Michael Yurkanin, Orthopedic and Traumatic Surgeon, saw the claimant in a consultative exam on April 16, 1981. His impression was paralysis, left sided, secondary to encephalitis. It was his feeling that the claimant appeared to exhibit memory loss secondary to the encephalities and that he would be unable to function in a supervisory capacity of employment.

Hospital reports showed diagnostic impression at admission of acute psychosis secondary to seizure disorder, history of left CVA with past history of seizures, and cerebrovascul artery disease. He has a history of being found on the floor by his bed after shaking all over. He does not remember the events surrounding the seizure. He was found by his mother and was incoherent, incontinence of the stool; he had bitten his tongue during this dpisode. He is in a state of confusion following his seizures. Other impressions were acute psychosis with seizure disorder, history of left CVA and past history seizures and cerebral vascular artery disease. Accordingly, the severity of his impairment meets the listing of 11.02 (grand mal epilepsy) A and B, and he is entitled to a period of disability beginning March 3, 1977 and to disability insurance benefits under Title II of the Social Security Act, as amended, based on his application of March 16, 1981.

Francis Mayhue
Administrative Law Judge

Date: October 29, 1981

MEMORANDUM

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

TO : Louis B. Hayes,
Associate Commissioner, OHA

DATE: January 5, 1982

REFER TO:

FROM : Francis Mayhue, ALJ
Fort Smith, Arkansas

SUBJECT: Travel to Detroit, Michigan, to hear Appeals Council Remand

On December 23, 1981, the Appeals Council remanded the following case to me:

Mr. Robert H. Choiniere
12758 Promenade
Detroit, MI 48213
SSN: 371-36-5768

I am ordered to schedule a hearing in Southfield, Michigan.

My concern is the expense and loss of time entailed in following this order. It does not seem economically expedient for an ALJ to travel the distance involved to hear one case. On the other hand, I could not take a full docket in Detroit because my staff consists of only a hearing clerk and a Hearing Analyst and I have a backlog of cases in my own service area.

Therefore, I request that you issue or authorize a special travel order in this instance. In the meantime, I am in the process of scheduling this case for hearing in the very near future in order to insure that the claimant's due-process rights are not violated.

F. Mayhue
Francis Mayhue
Administrative Law Judge

cc: CALJ
RCALJ
ALJIC, Fort Smith
Claimant's attorney

[illegible] 5 (1) PA[illegible]

DEPARTMENT OF HEALTH & HUMAN SERVICES

Refer to: SGE3

Memorandum

Date: FEB 22 1982

From: Associate Commissioner
Office of Hearings and Appeals

Subject: Your Request for a Travel Order On AC Remand for a Hearing in Southfield, Michigan--ACTION

To: Francis Mayhue
Administrative Law Judge
Fort Smith

On January 5, 1982, you requested that I authorize a special travel order for your travel to Southfield, Michigan to hold a hearing for claimant Robert H. Choiniere, SSN 371-36-5768, pursuant to an Appeals Council remand issued on December 23, 1981. Please accept my apology for the delay in responding.

I have been advised by the group conducting the review of Fort Smith cases that by now you have received four or five Appeals Council remands directing you to hold hearings for Southfield/Detroit area claimants. Since this is a substantial number of "travel" cases, I do not believe a special travel order is necessary.

I am confident that you will schedule these hearings in a manner that both ensures due process and is cost efficient for the Office of Hearings and Appeals.

Louis B. Hays

cc: CALJ Brown
RCALJ O'Bryan
ALJIC Thomasson

NO. 6 (1 PAGE)

Chairman PICKLE. Yes, thank you, Judge. We don't like to hear these things, but we appreciate that you would say them.

Now, Judge Hubbard.

STATEMENT OF DAVID T. HUBBARD, ADMINISTRATIVE LAW JUDGE, OFFICE OF HEARINGS AND APPEALS, FORT SMITH, AR

Mr. HUBBARD. Mr. Chairman Pickle, Mr. Anthony, and Senator Pryor, we have provided for you a very extensive written statement. I must remind you that the interference with the function of the administrative law judge and the concern about high reversal rates goes back several years.

It is not a new occurrence. Now, I remind you, Mr. Pickle, that in hearings before the Subcommittee on Social Security concerning H.R. 5700 dated March 16, 1982, at page 270, you were provided with some very alarming evidence of what went on in New Orleans, LA, where every ALJ in that office was called to Washington and counseled because the administrative law judge in charge in that office said that the ALJ's in that office were paying too many cases.

Frankly, sir, that's none of his business. But I must say that since 1981, our experience has been a nightmare. The Office of Hearings and Appeals began a program by incorrectly interpreting congressional intent in Public Law 96–265 by establishing the Bellmon review, whereby administrative law judges were targeted by the administration solely upon their allowance rates.

This was done in spite of studies done by the agency which showed serious decisional errors by administrative law judges having low allowance rates. In September 1982, the Associate Commissioner, Mr. Hays, advised the administrative law judge corps that a feedback system would be incorporated as an addition to the Bellmon review.

This would be a system whereby individual ALJ's would be advised of their "decisional weaknesses," and provided with "a mechanism for long-term improvement." Another part of that memorandum provided for a timetable for improvement, failing improvement within certain steps and after certain training and counseling the memo promised that "other action would be taken."

I received a letter from the chief administrative law judge in December 1982, stating that I would be expected to undergo "peer counseling" to be conducted by Regional Chief Administrative Law Judge Harold Adams, and Deputy Chief Administrative Law Judge Irwin Friedenberg, who are incidentally, sir, not my peers, because they could make recommendations as management officials to the chief administrative law judge that "charges" be brought against me before the Merit Systems Protection Board.

When this was received I retained personal counsel and advised the officers of the Association of Administrative Law Judges of HHS that I felt this was the beginning of a process to not only to cause me to change some of my decisions, but to eventually to remove me from Federal service.

Shortly thereafter the Association of Administrative Law Judges of HHS filed suit against the Secretary in the U.S. District Court, Washington, DC, and Judge Joyce H. Green stopped the feedback system pending further proceedings in the court. Evidence received at the trial in Washington, DC, in late February and early March of this year showed that Mr. Hays, the Associate Commissioner for OHA, had a performance plan under the Senior Executive Service that contained very interesting language. His objective was, "Improve the uniformity in quality of ALJ decisions," and his standards were these:

> Take vigorous steps to substantially meet the goals of incorporating the POMS disability adjudicatory standards into social security rulings and reviewing 15 percent of all ALJ allowances. Phase out the use of the short form fully favorable decision and improve and increase training for ALJ's and support staff.

Now, I want you to listen to this. It also said "One result of these steps will be some reduction in the ALJ allowance rate." That's in a performance plan. His performance plan from October 1, 1982, to September 30, 1983, said this:

> Objectives: Improve the uniformity and quality of ALJ decisions. Standards: Continue the effective administration of the Bellmon own-motion review program, and to attempt to increase it to 25 percent of all ALJ allowance decisions, subject to the ability to increase staffing levels in the Office of Appeals Operations. Monitor and control the Government Representative Project. Complete the refresher training of all ALJ's.

Then, listen to this: "One result will be some further reduction in the ALJ allowance rate."

I am repulsed, sir, because the effect of the accomplishment of these performance plans is that Mr. Hays, the Associate Commissioner, would have been eligible for Senior Executive Service cash bonus awards. And, I don't like that, because he was eligible to get a cash bonus award by reducing disability benefits for the people in this country. I can assure you that Judge Green was repulsed.

Furthermore, evidence in the trial revealed that a mechanism was in place to subject the "targeted" ALJ's to "behavioral modifications." I hope you realize the seriousness of these management initiatives and that you would agree that such activity cannot be maintained in the light of the due process provisions of the U.S. Constitution and the APA sections of title 5 of the United States Code, which are designed, sir, to protect the public from agency interference in the decisionmaking process.

The time, sir, is ripe for the removal of ALJ's from the Social Security Administration and assignment to an Independent Review Commission as proposed by Senator Pryor in S.1911 or the creation of a unified corps of all ALJ's in the executive agencies as proposed by Senator Heflin of Alabama in S.1275.

I submit to you, sir, not only my statement. I submit to you my affidavit that was filed with the court. I further submit to you the resignation letter of Judge C.J. Occhipinti of Eugene, OR, and articles written in the Seattle Times-Seattle Post-Intelligencer dated July 17, 1983, which revealed to me, sir, that some judges who were under the Bellmon review succumbed to the pressure.

I further would like to make one more comment and that relates to your bill. I like every portion of the bill. I think it's a good bill, but I warn you that in your bill you have a provision which provides for a reconsideration hearing to be done at the State level. If you do not insist that some protection be given to those hearing officers it'll be no good, because the administration will put quotas on them, they'll put standards on them, and if you don't give any protection you might as well forget it. Our experience has showed that they'll do anything to stop the payment of benefits.

Thank you for your attention. [Applause.]

[The prepared statement follows:]

STATEMENT OF DAVID T. HUBBARD, ADMINISTRATIVE LAW JUDGE, FORT SMITH, AR

Mr. Chairman and members of the Senate and House committees, my name is David T. Hubbard and I am an Administrative Law Judge with the Department of Health and Human Services, Social Security Administration, assigned to the Office of Hearings and Appeals in Fort Smith, Arkansas. I am appearing here at your invitation and at your request.

We have provided to you a very extensive statement and I wish only to highlight certain parts of the statement. The interference with the function of the Administrative Law Judge and the concern about high reversal rates goes back several years. It is not a new occurrence. (See Hearing Before the Subcommittee on Social Security on H.R. 5700, March 16–17, 1982, Serial 97–54 at page 270, otherwise known as the New Orleans fiasco). However, since 1981 the Office of Hearings and Appeals has caused Administrative Law Judges to operate in a virtual nightmare existence. The Office of Hearings and Appeals began a program by incorrectly interpreting congressional intent in P.L. 96–265 by establishing the "Bellmon Review" whereby Administrative Law Judges were "targeted" by the Administration solely based upon their allowance rates. This was done in spite of studies done by the staff of the Office of Hearings and Appeals in Washington which showed serious decisional errors by Administrative Law Judges having low allowance rates. In September, 1982, the Associate Commissioner Louis Hays advised the Administrative Law Judge corps that a feedback system would be incorporated as an addition to the Bellmon Review. This would be a system whereby individual ALJs would be advised of their "decisional weaknesses" and provided with "a mechanism for long-term improvement". Another part of the memorandum provided for a timetable for improvement. Failing improvement within certain steps and after training and counseling, the memo promised that other action would be taken. I received a letter from the Chief Administrative Law Judge in December, 1982, advising me that I would be expected to undergo "peer counseling" to be conducted by Regional Chief Administrative Law Judge Harold Adams and by Deputy Chief Administrative Law Judge Irwin Friedenberg, who are, incidentially, not my peers because they could make recommendations as management officials to the Chief Administrative Law Judge that charges be brought against me before the Merit Systems Protection Board. When this was received, I retained personal counsel and advised the officers of the Association of Administrative Law Judges that I felt this was the beginning of a process to eventually remove me from Federal service. Shortly thereafter the Association of Administrative Law Judges filed suit against the Secretary and the "feedback system" was stopped pending further proceedings in the Court. Evidence received in the trial before U.S. District Judge Joyce H. Green showed that Associate Commissioner Hays' performance plan from April 1, 1982 to September 30, 1982 (Document No. 3) contained the following:

OBJECTIVES

Improve the uniformity and quality of ALJ decisions.

STANDARDS

Take vigorous steps to substantially meet the OMS goals of incorporating the POMS disability adjudicatory standards into Social Security Rulings and reviewing 15 percent of ALJ allowance decisions. Phase out the use of the short form fully favorable decision and improve and increase training for ALJs and support staff. One result of these steps will be some reduction in the ALJ allowance rate.

And his performance plan from October 1, 1982 to September 30, 1983 (Document No. 40 contained the following:

OBJECTIVES

Improve the uniformity and quality of ALJ decisions.

STANDARDS

Continue the effective administration of the Bellmon own-motion review program, and attempt to increase it to 25 percent of ALJ allowance decisions, subject to the ability to increase staffing levels in the Office of Appeals Operations. Monitor and control the Government Representative Project. Complete the referesher training program for all ALJs. One result will be some further reduction in the ALJ allowance rate.

I am repulsed because the effect of the accomplishment of these performance plans is that Mr. Hays would have been eligible for Senior Executive Service cash bonus awards.

Furthermore, evidence in the trial revealed that a mechanism was in place to subject the "targeted" Administrative Law Judges to behavioral modification (Document No. 10). I hope that you realize the seriousness of these management initiatives and that you would agree that such activity cannot be maintained in light of the Due Process provisions of the United States Constitution and the APA sections of Title 5 of the U.S. Code which are designed to protect the public from agency interference in the decision making process. The time is ripe for removal of ALJs from the Social Security Administration and assignment to an Independent Review Commission as proposed by Senator Pryor of Arkansas in S. 1911 or creation of a unified corps of all ALJs in the Executive Agencies as proposed by Senator Heflin of Alabama in S. 1275.

I will be willing to answer any questions which you deem necessary.

AFFIDAVIT

Comes David T. Hubbard after being duly sworn upon oath, and states:

1. I am an Administrative Law Judge employed by the Office of Hearings and Appeals, Social Security Administration, Department of Health and Human Services.

2. I am a member of the Association of Administrative Law Judges within the Department of Health and Human Services.

3. From August 17, 1981, until July 1, 1982, I was under 100 percent review by the Appeals Council. This means that every decision, whether it be an affirmation, reversal (allowance) [1] or dismissal, was reviewed by the Appeals Council. This was pursuant to Order by Chief Judge Philip T. Brown dated July 29, 1981. A copy of Judge Brown's Order is attached as Exhibit 1.

4. On July 1, 1982, I was notified by Judge Brown that I had been removed from 100 percent review by the Appeals Council and placed under "Bellmon Review". A copy of this Order is attached as Exhibit 2. This means all reversal decisions have been reviewed by the Appeals Council pursuant to Section 304 of PL 96-265, commonly known as the Bellmon Amendment. A copy of this Public Law is attached as Exhibit 3. The Bellmon Amendment provided for ongoing review of decisions by Administrative Law Judges, but the Appeals Council adopted a policy of reviewing only reversal decisions wherein the Administrative Law Judge granted benefits to a claimant as opposed to a denial decision issued by an Administrative Law Judge. I am convinced that all of my reversal decisions have been reviewed by the Appeals Council and my reason for this belief is contained in a memorandum from Louis B. Hays to all Administrative Law Judges, dated September 24, 1982. A copy of this memorandum is attached as Exhibit 4.

5. On December 29, 1982, Philip T. Brown, Chief Administrative Law Judge, directed a letter to me which states:

"As you know, Section 304 of PL 96-265 generally referred to as the Bellmon Amendment, requires an ongoing review of ALJ decisions. In its review, the AC has taken own motion action in a number of decisions you recently issued. Essentially, the problems identified concern or are related to your evaluation of 'disability' within the regulatory frame work, as well as incomplete or incorrect assessment of the medical evidence before you.

"We firmly believe that a system of timely information feedback is an effective training device to assist an ALJ in mastering claims adjudication policies, procedures, and techniques. You will be contacted in the near future by the Regional Chief Administrative Law Judge concerning an informational session in which the identified problems will be disscussed. Deputy Chief ALJ Irwin Friedenberg will be present at this meeting.

---

[1] Reversal and allowance are synonymous terms in SSA bureaucratic language.

"Our objectives are to provide individual guidance and to improve the overall quality and consistency of the decision making process. Peer counselling is a fundamental part of achieving these goals."

6. Following receipt of this document I directed a letter to Judge Brown asking him for his statutory authority for the "peer counselling" as provided in his December 29, 1982, letter. To date, Judge Brown has not responded although Judge Brown has received the letter. A copy of the letter, as well as a copy of the return receipt, are attached hereto as Exhibit 5.

7. On January 10, 1983, I was advised that I will be expected to appear in Dallas, Texas, on January 19 or January 20, 1983, for the purpose of "peer counselling", and the "peer counselling" will be conducted by Regional Chief Administrative Law Judge Harold Adams and Deputy Chief Administrative Law Judge Irwin Friedenberg. I am convinced that the current directive to attend the peer counselling is an action to harass me and is intended to affect my decisional independence, and the sole reason is to cause me to allow fewer claims. This violates my decisional independence and my rights as provided for by the Administrative Procedure Act as codified in Title V of the United States Code.

This statement is given by me on this 11 day of January, 1983.

DAVID T. HUBBARD,
Administrative Law Judge.

Subscribed and sworn to before me this 11th day of January, 1983.

CATHY A. HICKS,
Notary Public.

My commission expires July 8, 1990.

Exhibit 1

DEPARTMENT OF HEALTH & HUMAN SERVICES [illegible]

Refer to: SGA3

Memorandum

Date: JUL 29 1981

From: Office of the Chief Administrative Law Judge

Subject: Appeals Council Review of ALJ Decisions--ACTION

To: Administrative Law Judge in Charge
Administrative Law Judges
Fort Smith Hearing Office

During the visit of the Deputy Chief Administrative Law Judge in December 1980, collectively you advised him that you would consider Appeals Council review of your decisions an appropriate manner in which your adjudicatory practices could be evaluated. The Appeals Council, effective August 17, 1981, will review all decisions of ALJs in the Ft. Smith office.

Effective for decisions issued August 17, 1981 and until further notice you should begin the following procedures to effect this process:

> Forward all (i.e., Dismissals, Affirmations, Partial or Fully Favorable Allowances) claim files with cassettes to:
>
> Office of Hearings and Appeals
> Social Security Administration
> Post Office Box 1207
> Arlington, Virginia 22210

You can be assured that your decisions will be handled expeditiously and that any delay in effectuating a favorable decision will be held to a minimum.

Philip T. Brown
Philip T. Brown
Chief Administrative Law Judge

DEPARTMENT OF HEALTH & HUMAN SERVICES

Refer to: SGR2

Memorandu

Date: JUL 01 1982

From: Chief Administrative Law Judge

Subject: Ongoing Review Directed by Section 304(g) of P.L. 96-265 -- ACTION

To: David T. Hubbard
Administrative Law Judge
Fort Smith, AR

PURPOSE

This confirms the telephone conversation on July 1 when you were notified of new procedures to follow in referring your cases to Central Office for review. Effective July 6 and until further notice, you should forward only your reversal decision cases involving title II and concurrent disability issues to the Office of Appraisal for review under the Bellmon Amendment. All other types of reversal cases, as well as affirmation and dismissal cases should be processed routinely, in accordance with the OHA Handbook instructions.

The following instructions should be followed by your staff in releasing all your favorable title II and concurrent cases involving the issue of disability. These instructions apply only to disability issue reversal cases. If disability was not at issue in the hearing decision, for example, if workmen's compensation offset or entitlement of a dependent child whose entitlement was not contingent on his/her being disabled, etc., was the issue in the decision, that case should not be referred to OHA.

INSTRUCTIONS

1. Partially and fully favorable title II and concurrent disability issue cases are to be processed in the normal manner through the issuance and mailing of the hearing decision.

2. The case control instructions outlined in the OHA Case Control System Manual for the posting of the HA-670 control card and the SSA-672 coding sheet will be followed in these cases; enter location code 5950 in "CTT" on both the control card and the coding sheet on the 335 section. Location code 5950 will flag the Case Control System that the case has been selected for Bellmon review. (Note: In some concurrent cases, a reversal decision may be issued on only one part. Follow the above instruction for both parts). All cases referred to Central Office for this review, must include the appropriate copies of the HA-670 control card in the claim file(s).

Exhibit 2

3. Hearing cassettes are to remain with the claim folder in the cassette envelope for all cases referred to Central Office for this review. The cassette(s) are to be placed in the title II folder in concurrent cases. (AMSARS procedures now being piloted experimentally in selected locations will not apply in these instances). The cassette(s) must be sent with the claim file.

4. Routing of title II only cases: A form HA-5051 is to be stapled to the outside of the claim folder directing it to its normal effectuating component. On top of this route slip (HA-5051) to the effectuating component, staple a form HA-505 directing the claim folder to OHA, P.O. Box 1207, Arlington, VA 22210.

5. Routing of concurrent cases: The two claim folders are to be split and set-up for release in the normal manner, with appropriate photocopies placed in the SSI folder. Prepare a form HA-5051 for each folder, directing it to the proper effectuating component, and staple it to that folder. Use rubber bands to keep both the title II and SSI folders together with the title II folder on top for sending to CO. Please do not staple them. Prepare a route slip, form HA-505, directing the combined files to OHA, P.O. Box 1207, Arlington, VA 22210, and staple it on top of the HA-5051 to the effectuating component on the title II file. Release the files together as indicated above to Central Office. Further routing to the appropriate effectuating components will be done, based on your pre-prepared HA-5051 route slips.

6. The person(s) in the office responsible for releasing the folders will complete a HO/ALJ Report (see copy attached) for each case or group of cases he/she is referring to OHA. Care should be taken to make sure that these reports are legible. Please supplement the attached forms with photocopies until you receive a printed supply. The HO/ALJ Report is to be released at the same time the folder or folders are released. The HO/ALJ Report is to be mailed to: OHA, Office of Appraisal, Attn: Margie David, P.O. Box 1207, Arlington, VA 22210. The envelope should carry a DO NOT OPEN IN MAILROOM annotation. A HO/ALJ Report should accompany every case or group of cases mailed to CO.

7. All applicable cases and HO/ALJ Reports referred to above must be forwarded immediately upon release of the decision. If several decisions are released at the same time, then those cases may be grouped for mailing on the same day. Otherwise, do not hold a case for group mailing to Central Office, send it alone with a report.

8. Post decision correspondence is to be handled in accordance with present instructions.

I appreciate your cooperation in this matter. If you have any questions regarding these instructions, please contact Margie David at FTS 235-1814.

Philip T. Brown

Attachment

cc:
ALJIC
RCALJ

Exhibit 3

(d) In any case in which any person who as of December 31, 1978, is entitled to receive pension under section 521, 541, or 542 of title 38, United States Code, or under section 9(b) of the Veterans' Pension Act of 1959, elects (in accordance with subsection (a)(1) or (b)(2), as appropriate) before October 1, 1979, to receive pension under such section as in effect after December 31, 1978, the Administrator of Veterans' Affairs shall pay to such person an amount equal to the amount by which the amount of pension benefits such person would have received had such election been made on January 1, 1979, exceeds the amount of pension benefits actually paid to such person for the period beginning on January 1, 1979, and ending on the date preceding the date of such election.

(e) Whenever there is an increase under subsections (a)(3) and (b)(4) in the annual income limitations with respect to persons being paid pension under subsections (a)(2) and (b)(3), the Administrator of Veterans' Affairs shall publish such annual income limitations, as increased pursuant to such subsections, in the Federal Register at the same time as the material required by section 215(i)(2)(D) of the Social Security Act is published by reason of a determination under section 215(i) of such Act.

• • • • • • •

[*Internal References.*—Social Security Act § 1133(a)(1) cites § 306 of the Veterans' and Survivors' Pension Improvement Act of 1978 and Social Security Act § 215(i)(4) has a footnote referring to this public law.]

SOCIAL SECURITY DISABILITY AMENDMENTS OF 1980

P.L. 96-265, Approved June 9, 1980 (94 Stat. 441)

Sec. 1. [42 U.S.C. 1305 note] This Act may be cited as the "Social Security Disability Amendments of 1980".

• • • • • • •

Sec. 201. * * *

(e) [42 U.S.C. 1382h note] The Secretary shall provide for separate accounts with respect to the benefits payable by reason of the amendments made by subsections (a) and (b) so as to provide for evaluation of the effects of such amendments on the programs established by titles II, XVI, XIX, and XX of the Social Security Act.

• • • • • • •

Sec. 304. * * *

(g) [42 U.S.C. 421 note] The Secretary of Health and Human Services shall implement a program of reviewing, on his own motion, decisions rendered by administrative law judges as a result of hearings under section 221(d) of the Social Security Act, and shall report to the Congress by January 1, 1982, on his progress.

• • • • • • •

(i) [42 U.S.C. 421 note] The Secretary of Health and Human Services shall submit to the Congress by July 1, 1980, a detailed plan on how he expects to assume the functions and operations of a State disability determination unit when this becomes necessary under the amendments made by this section, and how he intends to meet the requirements of section 221(b)(3) of the Social Security Act. Such plan should assume the uninterrupted operation of the disability determination function and the utilization of the best qualified personnel to carry out such function. If any amendment of Federal law or regulation is required to carry out such plan, recommendations for such amendment should be included in the report.

• • • • • • •

TIME LIMITATIONS FOR DECISIONS ON BENEFIT CLAIMS

Sec. 308. [42 U.S.C. 401 note] The Secretary of Health and Human Services shall submit to the Congress, no later than July 1, 1980, a report recommending the establishment of appropriate time limitations governing decisions on claims for benefits under title II of the Social Security Act. Such report shall specifically recommend—

(1) the maximum period of time (after application for a payment under such title is filed) within which the initial decision of the Secretary as to the rights of the applicant should be made;

Exhibit 4

Refer to: SGR1

Memorandum

Date SEP 24 1982

From. Associate Commissioner
Office of Hearings and Appeals

Subject. Description of the Bellmon Own-Motion Review Program — INFORMATION

To. All Administrative Law Judges

The purpose of this memorandum is to provide you with an overview of the Bellmon review as it is now functioning and the results of the review.

The ongoing review of hearing decisions under the Bellmon Amendment is intended to promote greater consistency and accuracy by identifying and correcting those decisions that do not comply with the applicable provisions of the law, regulations and Rulings. Under the Bellmon review program, the Appeals Council, on its own motion, formally reviews ALJ decisions that do not appear to be correct and, where the decision is incorrect, either reverses the ALJ's decision or remands the case to the ALJ for further proceedings. (For a more complete description of the procedures used by the Appeals Council, see Social Security Ruling 82-13 published in the January 1982 compilation of the Rulings.) This program results from Congressional concerns about the high overall percentage of cases allowed at the hearing level, the wide variance in allowance rates among individual ALJs, the fact that only ALJ decisions denying benefits were generally subject to further review, and the inconsistencies noted in decision-making at the different adjudicatory levels.

The initial phase of the pre-effectuation ongoing review program, which started October 1, 1981, was limited to approximately seven and one-half percent of all Title II and Title II/XVI concurrent disability allowance decisions issued by a group of hearing offices (HOs) and individual ALJs selected on the basis of allowance rates of 70 percent or higher, and 74 percent or higher, respectively. Allowance rates were used as the basis for selecting the initial review group, both because of Congressional intent and because studies had shown that decisions in this group would be the most likely to contain errors which would otherwise go uncorrected. Rather than reviewing all disability allowance decisions produced by these HOs/ALJs, a decision was made to review half of the group's allowance decisions in order to increase the total number of ALJs under review and thereby enhance the overall effectiveness of the review. The initial selection procedure was designed to yield a group of hearing decisions for review which were likely to be among the most error prone and thus to make the most efficient use of resources while correcting the greatest number of faulty hearing decisions.

On April 1, the Bellmon review was enlarged to include 15 percent of ALJ disability allowance decisions, and the case selection criteria for the Bellmon program were redesigned and expanded. Under this expansion, the group of ALJs selected on the basis of high allowance rates is just one of several components of the review. A national random sample of ALJ allowances, without regard to any ALJ's allowance rate, now accounts for 25 percent of the total reviewed cases. The expanded Bellmon review also includes cases identified and referred to the Appeals Council by the Office of Disability Operations (ODO). In addition, a review of decisions from new ALJs is included in the program. One other change has been to remove entire hearing offices from the review.

The following is a summary of the four aspects of the Bellmon review:

- Random Sample - A national random sample of allowance decisions accounts for 25 percent of the Bellmon cases. These cases are randomly selected and sent to OHA from ODO prior to effectuation. Data from this part of the Bellmon review is especially important as a baseline for comparison with information from the review of individual ALJs. It is also an important means of providing feedback on the quality of decisions to all ALJs and will aid in identifying areas where policy clarification or training is needed.

- New ALJs - The decisions from new ALJs are reviewed until it is determined that each ALJ's work is satisfactory. The review of new ALJs is useful in determining the effectiveness of the ALJ training program, and it enables us to take remedial action, if necessary, at the most opportune stage in an ALJ's development.

- ODO Protests - Disability examiners in ODO are reviewing a sample of ALJ allowances prior to effectuation as part of a pilot project. If a disability examiner believes there is a substantive disability issue in the case which does not comport with the law and regulations, the claim file is referred to OHA and made part of the Bellmon review. The Appeals Council follows standard procedures in deciding whether or not to take own motion.

- Individual ALJs - During the initial phase of the ongoing review, data were collected on own motion rates (the frequency that the Appeals Council takes action to correct an ALJ decision). Based on these data, ALJs are divided into four groups — those on 100 percent review, 75 percent review, 50 percent-review and 25 percent review. Generally, as ALJs' own motion rates decline, their level of review also decreases. Continuing modifications are made in the group of ALJs under review and the level of review for individual ALJs. One hundred-six ALJs are included in this portion of the Bellmon review.

Although the allowance rate is the basis for selection of individual ALJs for that portion of the review, this factor receives no consideration in determining whether to remove ALJs from review. Decisional accuracy is the sole criterion, which we have defined as a five percent own motion rate for three consecutive months. In other words, an ALJ with an extremely high allowance rate could ✓ be removed from the Bellmon review if his or her decisions are correct.

Through September 1, we have reviewed 10,560 allowance decisions. The own motion rate for all of these cases is 12.1 percent. However, the rates vary significantly depending on the category of the review. The highest own ✓ motion rate, 50.7 percent, exists in the ODO protests. The next highest category is the group of individual ALJs, 14.2 percent. These rates are contrasted by the rates for the new ALJs, 7.5 percent and the random sample, 5.7 percent.

While the figures cited above are based on the cases where the Appeals Council has completed its action, there are a substantial number of cases pending where the Appeals Council's support staff has recommended that the Council take corrective action and such action has not yet been taken. Since our experience has shown that about 95 percent of these recommendations ultimately result in either reversals or remands at the AC level, it is noteworthy that the overall "recommended" own motion rate is approximately six and one-half percent higher than the actual own motion rate.

In addition to own motion rates, we also maintain information regarding the overall percentage of defective cases. A case is considered defective if the decision contains some type of deficiency — improper basis for disability conclusion, failure to follow sequential evaluation, improper questioning of an expert witness, etc. — yet reaches an ultimately correct conclusion that the claimant is disabled. Through September 1, the overall defect rate was 47.6 percent, with the various category percentages as follows: ODO protests - 91.0 percent; random sample - 52.7 percent; individual ALJs - 49.7 percent; and new ALJs - 30.5 percent. Although the majority of these decisions did not contain deficiencies so severe that an own motion action was recommended, the Social Security Regulations are not being correctly applied in many instances.

An essential requirement to ensure the success of the Bellmon review program is to provide a companion system for providing feedback on the results of the review. While the information we obtain from the review is very helpful in guiding our training and continuing education efforts, I believe there must be a more individualized process for those ALJs in the individual category. Such a system is now being implemented. The purpose of the feedback system is to advise affected ALJs of decisional weaknesses and to provide a mechanism for achieving long term improvement.

Under the first stage of the feedback system the Chief Administrative Law Judge (CALJ) will send a memorandum to the appropriate Regional Chief Administrative Law Judge (RCALJ) enclosing a brief outline of the particular problems found in the decisions of that ALJ. Also enclosed will be summaries of several cases reviewed by the Appeals Council on its own motion with supporting documentation. The RCALJ, together with Deputy Chief Administrative Law Judge Irwin Friedenberg on occasion, will meet with the ALJ involved to discuss the problems reported and review steps that can be taken to improve the accuracy of his or her decisions.

Thereafter, a further review of the ALJ's decisions will be undertaken for three months to determine if there has been improvement. If no change has occurred the CALJ may either request additional counselling through the RCALJ or authorize special training in the region or in Central Office. If there is still no measurable improvement other steps will be considered.

Initially, because of staffing limitations, feedback will be limited to those individual ALJs who are included in the 100 percent review group. As the system progresses, all ALJs remaining in the individual group will be included in this process.

Louis B. Hays

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

Office of Hearings & Appeals
616 Garrison Building, Room 203
Fort Smith, Arkansas 72901

January 4, 1983

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Philip T. Brown
Chief Administrative Law Judge
Office of Hearings and Appeals
P. O. Box 2518
Washington, D. C. 20013

Re: SGR1

Dear Judge Brown:

This will acknowledge receipt of your letter of December 29, 1982, advising me that the Appeals Council has identified problems relating to my evaluation of "disability" within the regulatory framework, as well as incomplete or incorrect assessment of the medical evidence before me.

You mention that you are proposing "peer counselling" as provided for in Section 304 of PL 96-265 generally referred to as the Bellmon Amendment. I am quite familiar with the Bellmon Amendment but I cannot find within that piece of legislation any authority for the proposed "peer counselling".

Would you please furnish to me any other statutory authority under which you and Judge Friedenberg propose to follow in the "informational session" to be conducted by him.

Yours very truly,

David T Hubbard
David T. Hubbard
Administrative Law Judge

cc:

Harold G. Adams, Regional Chief
Administrative Law Judge

Exhibit 5

Refer to:

Memorandun

Submitted for record with Hubbard statement

Date: May 19, 1983

From: C. J. Occhipinti, ALJ
Eugene Hearing Office

Subject: Resignation (Retirement)

To: Doris Coonrod, RCALJ
Region X

This is to advise you that as of the close of business on June 10, 1983, I am electing to retire from Federal Service. I had hoped to remain several more years, but find that the changes imposed make it impossible to remain and retain my integrity. Recent administrative policies appear certain to reduce the judicial adjudication of claims to fast track clerical automated justice. Perhaps this should be expected in an era of computer games and declining values. I leave with regret and deep disappointment. My association with the Social Security Administration has spanned almost nine years, and I regret the turn that the Agency has taken. I do have fond memories of professional managers and concerned employees, who showed a sensitivity for people and the law, and managed to violate neither in discharging their duties. The present irresponsible and ruthless demands being made, however, especially in the area of producing "more" without any valid basis or concern as to the reasonableness and legality, has destroyed this feeling which I had for this Agency.

Many of my colleagues have consciously or unconsciously succumbed to the irresponsible demands, possibly in order to preserve their careers, or in some cases, welcoming the reduction in responsibility and effort - - by merely checking boxes and producing the ever-increasing numbers demanded by those blinded by ambition and impervious to truth and honesty. The disability fund is not really in trouble, and the managers can and will make hay with their impressive statistics, pursuing this irresponsible tact until the full impact of poorly adjudicated cases results in a deficit, or is recognized by honest and responsible legislators for the travesty it really is. (My reversal rate is below the national average, and remands of less than two per year indicates some adherence to quality). However, since it is politically expedient at this time, I find that any cry for sanity is ignored and quality will be lost in the maze of management and bureaucracy.

I cannot thus remain associated with this philosophy, as the integrity of the office I hold, as well as my personal values, cannot be diluted, nor will I condone the methods employed to achieve the questionable goals at the expense of deprived litigants, including the raping of the taxpayers in this process. In all honesty, announcement 318, which presumes to recruit ALJs should be abolished, or drastically revised.

Again, with deep regret, and great disappointment, I feel it is time to leave what is a well intentioned program which has surrendered integrity for expediency.

cc: Lou Hays, Assoc. Comm.
Don Sutcliffe, Reg. Comm.

[From the Seattle Times, Seattle Post-Intelligencer, July 17, 1983]

TARGET: DISABILITY BENEFITS—RUTHLESS CUTTING, SEVERE PRESSURE CITED BY JUDGE

(By Peter Lewis)

Gordon Callow's sense of justice is offended by his boss, the Social Security Administration.

Social Security is supposed to help disabled people in need, says Callow, an administrative law judge in Seattle. But instead, a "cult of management" is ruthlessly reducing the rolls of people qualified for disability benefits, he says.

Worse, Callow and hundreds of other administrative-law judges believe they are being pressured, under the banner of good management and efficiency, to rush through cases and to issue decisions in lockstep with cost-cutting policies.

At least some of the evidence suggests that judges have responded by allowing benefits in fewer cases and by more readily ruling in the government's favor in close calls.

In the balance is the integrity of the administrative-law process and the fairness of the Social Security system, which annually doles out more than $18 billion in benefits to more than 4 million disabled people nationally.

In Washington State, about 68,000 people receive roughly $280 million in federal disability benefits annually.

The policies, he said in his letter of resignation, "make it impossible to remain and retain my integrity . . . Many of my colleagues have consciously or unconsciously succumbed to the irresponsible demands, possibly in order to preserve their careers."

The instruments of pressure, judges say, are job reviews of selected judges and new production goals, set by Social Security managers, calling on each judge to decide 45 cases a month—double the average of a few years ago.

Agency officials deny they have imposed quotas, but The Times has obtained copies of memos distributed to judges which discuss production goals. In a memo dated July 22, 1982, Social Security's director of field administration refers to 16 "action steps" leading to discharge that the agency may take to deal with "underachieving" judges.

The job reviews, known as "Bellmon reviews" after legislation passed in 1980, have been ordered for judges who have a high "allowance rate," meaning they often allow benefits to be paid to people whose claims were denied by the agency.

During the fiscal year which ended Sept. 30, judges nationally granted benefits 53 percent of the time, Social Security Administration figures show. Job reviews were ordered for judges who granted benefits 70 percent of the time or more, on the theory that such judges aren't as accurate in their rulings as their colleagues.

DISABILITY SCORECARD—HOW OFTEN JUDGES GRANTED BENEFITS

[In percent]

Judges	1981	1982
Baloun, L., Spokane	61.5	63.4
Bergtholdt, E., Spokane	84.4	76.2
Callow, G., Seattle	79.9	72.7
Driscoll, M., Seattle	73.3	65.1
Heller, J., Seattle	72.5	62.6
Hood, J., Spokane	68.6	53.2
Tunik, L., Spokane	60.7	48.7
Warns, R., Seattle	80.1	60.7
Wetherholt, R., Seattle	83.0	51.5
Wise, G., Seattle (died May 1, 1983)	71.6	70.2

Once under review, the Social Security Administration says, accuracy, and not allowance rates, becomes the only criterion. But judges say the reviews have a "chilling effect," making each magistrate think twice before issuing a decision which reverses the bureaucracy. And the new caseloads require judges to work faster, making it likely that many cases won't be considered properly, they say.

The 800 administrative-law judges hear appeals of administrative decisions denying disability benefits. Their decisions can be reviewed by the Appeals Council, Social Security's final appeals level. People who wish to contest Appeals Council rulings go through the federal courts.

By law, the judges are supposed to be free of agency influence, although they work in Social Security offices and are paid a top salary of more than $63,000 a year.

In practice, the gap between federal policy and judicial objectivity has narrowed, judges say.

Occhipinti, who was not among judges who were reviewed, complains about the "irresponsible and ruthless demands being made" of judges, "especially in the area of producing 'more' without any valid basis or concern as to the reasonableness and legality."

Callow, among the few judges who would speak for the record, says Social Security officials are using the job reviews "not too subtly to coerce the outcome of decisions." The Bellmon reviews represent "an overt attempt to get judges to reduce their reversal rates," he says.

The Carter administration, concerned that the Social Security trust fund was going broke and that administration of its programs wasn't effective, began the most recent efforts to tighten management. Subsequent studies found that one of every five people receiving benefits wasn't eligible for them.

New rules and procedures adopted in the late 1970s were aimed at solving many of the problems. The effect of the new regulations was to deny benefits to more new applicants and to accelerate review of old cases.

Thousands of people have been dropped from the disability rolls. In Washington alone, about 6,000 people have lost eligibility, says Ed Davis, head of the state Office of Disability Insurance.

There has been a corresponding jump in the number of appeals. Nationally, the number of hearings scheduled for administrative judges is projected to reach 400,000 this year, nearly double the 1975 level.

In the midst of these changes, the Bellmon Amendment became law. The 1980 law authorized the agency's Appeals Council to review "on its own motion" the accuracy of judicial decisions.

The vast majority of judges chosen for review had high "allowance rates." A few judges also were targeted because they deny claims far more often than their colleagues.

The agency also began what Callow calls a "brainwashing" program to indoctrinate new judges and staff attorneys to mass-produce decisions, with an eye toward denying benefits.

Occhipinti, a judge in Eugene for nine years, says the emphasis on "getting rid of cases" as fast as possible has been caused, in part, by the practice of paying bonus money to managers who improve production. A Social Security spokesman confirmed that bonuses are awarded to the hardest-working officials.

Callow, 62, the older brother of state appeals court Judge Keith Callow, marked 31 years of government service on July 4. He agreed to speak "with the undaunted courage of a short-timer retiring at the end of September 1983."

He's among the judges targeted for review, for which he is grateful. He would "feel like a legal whore" if he were not, he says.

He summarized three cases which he said were "unconscionable" examples of the government acting recklessly and ruthlessly to reduce costs. They are the sort of case which some judges worry might not receive proper attention under the new pressures.

After paying benefits for a dozen years to a 62-year-old cancer patient, the agency wrote his doctor and asked one question: Is the cancer in remission?

Social Security cut benefits.

Callow discovered that after the doctor's "yes" came the word "but"—and a lengthy account of the disabling side effects of chemotherapy.

The patient was unemployable, "if for no other reason because he can't stay awake long enough" to hold a job, Callow recalled.

A 45-year-old logger, hit by a falling snag, had damaged nerves in his lower back and had trouble walking. Continuing lower-back pain was only partly relieved by medication.

After the logger's third operation in three years, the agency stripped him of benefits on the grounds that "enough time had passed that he should be medically improved," Callow says.

The examiners who made the determination didn't check whether the logger was improved, Callow says. And they never saw the pain in his face.

A 53-year-old, European-trained chef suffered a heart attack that required bypass surgery. He applied for benefits.

When the agency checked into the claim, his doctor reported the operation was successful.

Benefits were denied. The chef appealed.

When Callow saw him at the hearing, the man kept his arms folded close to his body. The operation had required separation of his ribs on one side.

He was wired together, but the wire had parted and torn through his bones.

Callow granted benefits.

"I never should have seen any one of those three guys," Callow said. "I won't say it's despicable. But in my opinion, it has been unconscionable to knock these people off the rolls without any more effort to show why than these agency people have expended."

The administrative-law judge notes that benefits usually are denied without a personal interview, and usually by an examiner with no medical training.

Whether the system is fair is the subject of various lawsuits. In a decision last month which affects an estimated 20,000 Washingtonians, U.S. District Judge Donald Voorhees ordered the agency to reconsider cases in which people may have had benefits illegally denied or cut. He also ordered the agency to consider the opinions of treating physicians when evaluating claims.

Another federal judge in Los Angeles ruled last month that Social Security has been operating outside the law in nine western states. Both judges found the agency has failed to heed earlier court orders requiring that there may be evidence of medical improvement before people may be removed from disability rolls.

As a consequence, agency officials have stopped sending out denial or cut-off notices pending appeal of Voorhees' order, Disability applications from state residents have piled up in Olympia at the rate of 550 a week since early June.

Neither the agency nor the judges can muster compelling evidence to support their respective contentions about the effects of debated policies.

Agency records show that of the Seattle region's 22 judges, 10 have been under Bellmon review. The records, disputed by some judges, say four or five judges remain under review.

The reviewed Seattle-region judges were found to make mistakes more often than judges who were reviewed nationally, the Social Security records indicated. The figures were obtained only after the agency complied with a request filed under the Freedom of Information Act.

The Appeals Court reversed or remanded 19.27 per cent of the cases reviewed here, compared with 16.7 per cent of the cases reviewed nationally.

Social Security records show that Seattle-region judges disposed of fewer cases than their colleagues. And, since the Bellmon reviews took effect in fiscal 1982, Seattle judges have gained benefits with declining frequency.

Since 1981, the allowance rate for all 22 Seattle region judges has fallen 2 percentage points, to 58 percent. But for the 10 targeted judges, the allowance rate has fallen 11 percentage points, to 63 percent.

It's not clear whether the sharp downward trend has been caused by agency pressure, although one Seattle judge, who asked not to be identified, said fear of losing his job has caused him to favor the government in close cases.

Social Security officials maintain that Bellmon reviews are being carried out in accord with congressional intent to check the quality of decisions by judges. They can provide no figures to show whether Bellmon has cost or saved money, but stress that the goal is accuracy, not saving money.

Since April 1982, Social Security has tried, through the Merit Systems Protection Board, to remove several judges because they haven't issued enough decisions, says Charles N. Bono, president of the Administrative Law Judges Association.

The association, in a lawsuit against the agency, seeks an injunction to prevent officials from setting quotas and from continuing other practices.

Mr. Bono contends the agency has set quotas despite a consent decree signed in another case barring them. Such quotas create an "atmosphere of intimidation" within judicial ranks, he says.

In testimony to a Senate subcommittee, Louis Hays, the deputy commissioner of Social Security, said quotas haven't been set for individual judges.

"However," he said, "all SSA employees, including ALJs, are required to perform at minimally acceptable levels of efficiency and proficiency . . . In order to achieve this end, the chief ALJ monitors the productivity of the ALJs . . .

"Perhaps some ALJs feel pressure because of these efforts, but I do not believe it is improper pressure. We have an obligation to the taxpayers and the claimants to ensure that each ALJ maintains a minimally acceptable level of decisional output."

Callow, the chief administrative-law judge here from 1975 to 1981, concedes that some judges weren't working hard enough in the mid 1970s. But annual production per judge in the region rose to 305 cases from roughly 125 between 1975 and 1980, he says.

Says Bono:

"The effects of (agency) programs and policies converted the appeals systems into a production line. At first, the ALJs, recognizing the crisis in the caseload, responded without question to the pressures of management.

"But, as each plateau of production was reached, the goal or quota was increased. It became apparent that a real interference with the duties and responsibilities of the ALJs was taking place."

Chairman **Pickle**. Judge, we'll certainly keep your suggestions in mind. We are certainly mindful that you've been extremely bold in your comments, and I know that you made an affidavit to that statement. We're going to pass all this along to the administration for their response too.

Mr. **Hubbard**. Mr. Pickle, everything that I said regarding the trial, the documents from which I quoted are attached to our statement. They are matters of public record. They were introduced in the trial of the case that we filed. They know of their existence. It's all a matter of public record.

Chairman **Pickle**. Thank you. I'm sure it is. Now, we'll be glad to hear from Minnie Dormois.

STATEMENT OF MINNIE E. DORMOIS, HEARING ASSISTANT, OFFICE OF HEARINGS AND APPEALS, FORT SMITH, AR

Ms. **Dormois**. Mr. Chairman, members of the Senate and House Committees, I appreciate your invitation to be here today, and I will be very brief. I am submitting a written statement.

I would just like to say I began my employment with the office of hearings and appeals in March, 1978. In those 6 years I think I have become quite familiar with the Social Security regulations and the rules for determining disability.

In my position I have had the opportunity to be present at the hearings and to see these claimants come to their hearings, and most of the people here today will tell you, or could tell you, the fright, even terror they feel when they come to testify. These people are—some of them are physically and mentally disabled, some are suicidal even and homicidal. And, it does take experienced people working in the hearings and appeals office to deal with them.

But these physically and mentally disabled deserve caring people, and I believe that whether they be disabled or not they should receive a full and impartial hearing. What is happening now is not going to allow these claimants to have, I believe, a full and impartial hearing. Always in the past the hearing assistant has assisted the judge at a hearing. And, now Washington says we will no longer be able to do this.

The new program is what they call a Contract Hearing Reporter Program whereby they advertise in local newspapers for people in the claimant's hometown, for the people to assist the judge at a hearing. It's not required that they be a court reporter. It's not required that they have any experience, that they have any knowledge of social security. Only that they submit an acceptable low bid. And, I will say the acceptable low bid generally is more than what I make per hour, but that really is not to be considered.

But my main concern right now is the effect it has on the claimant. I can't possibly believe that these claimants, when they come to a hearing, frightened—in pain, and not knowing what to expect, would testify to everything that's wrong with them or would be completely open with the judge, when the hearing assistant or the hearing reporter assisting the judge is a neighbor, a friend or maybe not a friend, maybe a member of their church, they won't get a fair hearing because they won't tell that judge everything that's wrong with them.

Because it could be repeated in their hometown. I just can't believe these people will do that. The files of these people should be kept confidential. They have in the past. It was my understanding this program was instituted as a cost saving measure.

And, according to a memorandum which I have submitted with my statement today, the Associate Commissioner stated that the W.A.E. Program, that's the—well, actually employed program. The program we had just prior to this one was so successful that it saved the taxpayers $2 million annually.

Unfortunately the funds ran out for that program. I'm not sure why if it saved $2 million. So we have now the Hearing Reporter Program, and the Associate Commissioner says this program is going to save $2 million, but we're running out of funds now.

So when the hearing assistant that is assigned to a judge, travels with the judge, there is no cost for that hearing assistant. Yet we're paying these part time employees a tremendous amount of money. The people feel intimidated, they will not get a fair hearing, and the judges are not given competent help at a hearing. If they want accurate notes they will take them themselves.

Just recently Judge Thomasson came back from a hearing trip with an entire day's docket of blank cassettes. None of the hearings had been recorded, simply because the machine was not on "record." So now we will have to reschedule these hearings, these claimants, frightened as they are and perhaps in pain will have to go through this one more time.

I telephoned our regional office and talked to them about this, and I was told that I would have to be more patient and understanding of these poor things because these hearing reporters are only doing their thing. I would submit to you today that the hearing room where people are mentally and physically disabled is no place for a hearing reporter to be doing her thing. You need competent help that can help that judge and assure these people that their files will be confidential, try to make them feel as comfortable as possible so that they can tell the judge everything that is wrong with them.

The people here today know what I'm talking about, and I would ask your Committees to look into this program. It is not saving money. It is costing money. Our regional office tells me that the cost now is not the primary consideration. It is coming from our central office. It's just a directive from the central office, and it is my concern today that these people will not get a fair hearing as a result of it.

Thank you.

[The prepared statement follows:]

STATEMENT OF MINNIE E. DORMOIS, HEARING ASSISTANT, OFFICE OF HEARINGS AND APPEALS, FORT SMITH, AR

Mr. Chairman, members of the Senate and House committees, I appreciate your invitation and it is indeed a pleasure for me to be here today. I would like to briefly tell you of a problem I have encountered in my job as a hearing assistant in the appeals process and how I feel it relates directly to our claimants.

I began my employment with the Office of Hearings and Appeals in March, 1978 as a clerk/dictating machine transcriber, then as a hearing clerk. In December, 1980, I was promoted to my present position as a hearing assistant to an Administrative Law Judge. I have, in these six years, become quite familiar with Social Security Regulations and the rules for determining disability.

In my position, I have had the opportunity to be present at the claimants' hearings. Time will not permit me to tell you of all of the duties that I perform as a hearing assistant. Therefore, I would like to touch on only those that deal directly with the claimants. Most claimants come to their hearings, not knowing what to expect, and are extremely nervous and frightened. We see people who are physically and mentally disabled; those who are suicidal and even homicidal; those who trust no one, most of all Social Security; those who, for whatever reason, have been made to feel they are begging and would much rather be working if they were able. I have witnessed the people and I do understand how they feel. It is my feeling that every claimant requesting a hearing, whether they be disabled or not, should receive a full, fair and impartial hearing in the appeals process. It is my opinion, because of a new program dictated by our Central Office in Washington, the claimants will not receive the full hearings they have had in the past. The program I am referring to is the contract hearing reporter program. No longer will the hearing assistant who has read the entire file, pulled and marked the exhibits and who has knowledge of everything that is contained in the file be allowed to assist an Administrative Law Judge at the hearing. It has been dictated by our Central Office (see Attachment 1) that these services be provided on a contract basis by local people who live in the same community as the claimant. These people are not required to have any knowledge of the Social Security Regulations; they are not required to perform all of the duties of a hearing assistant; nor are they expected to possess the skills of a hearing assistant. It would seem the only requirement for the job is to submit a bid that is acceptable. I might mention at this time that most of the contract hearing reporters receive an hourly rate higher than mine.

My main concern is the effect of this program on the claimant. I cannot in my wildest imagination believe that anyone would testify to all that is wrong with them when a person of their own community, possibly a neighbor, a relative or even a member of their church, is present and is assisting the judge. It is incredible that anyone who dreamed up the position of contract hearing reporter can seriously believe the claimant is going to get a fair hearing. They cannot. The reason is that they simply could not and would not tell the Administrative Law Judge everything that is bothering them for fear it would be repeated. Remember, this person who is assisting the judge lives in the same town and is not a full-time government employee. The claim files of these people should, above all, be held in the strictest of confidence. The contract hearing reporters are part-time employees, working four to eight days per month. There is a big turnover in this program. In the last two weeks, in our office alone, we have gained two new reporters and two have resigned. Once removed, these people would feel no compulsion to keep these files confidential.

It is my understanding this program was instituted as a cost-saving measure. According to a memorandum which I have submitted as Attachment 2, the Associate Commissioner of Social Security stated the WAE (While Actually Employed) (the program just prior to our present contract hearing reporter program) was so successful that it resulted in approximately $2 million saved annually. Fortunately, or unfortunately, I am not sure, the program saved us so much money that funds ran out for that program and we have the present innovative contract hearing reporter program, which, according to the Associate Commissioner, will produce similar results. I am puzzled as to why we did not stay with the original program that saved us $2 billion! I am not challenging the dollar amount. I am however challenging the word "saved". I believe the correct word to be "cost". Further, a cost-comparison was not done prior to instituting these programs as provided in OMB Circular N. A-76 (revised), August, 1983. Therefore, I would like to give you a cost-comparison of my own. These are actual expenses of four hearing trips to Russellville, Arkansas. Mileage/transportation costs for the ALJ was $259.56 (4 x $64.89). The hearing reporter's salary was $200.00 (5 hours each day at $10.00 per hour x 4 days) for a total cost of $459.56. This involved a total of 20 hearings being held, or at a cost of $22.98 per each hearing using a *contracted hearing reporter. On the other hand*, as in the past, these same 20 hearings would be held in only 3 days using the regularly assigned hearing assistant. This is accounted for by the fact that an experienced hearing assistant is familiar with the ALJ's methods, is knowledgeable about the Program and can keep the hearings moving. The cost for these same 20 hearings, using a hearing assistant, would be $9.74 per each hearing (mileage cost-3 x $64.80—in the amount of $194.67). There is no cost involved for a hearing assistant to assist an ALJ on a one-day hearing trip. The hearing assistant is required to travel in the ALJ's vehicle unless special approval is given to the contrary. This is not an isolated cost-comparison. I cannot think of any instance whereby the program would same money. I spend more time in the office correcting mistakes that I would spend assisting at the hearing doing it right the first time. As an example, after a recent hearing trip by the ALJ, I discovered that all of the cassette tapes of the hearings were blank. I telephoned the hearing reporter and she stated she had turned the machine on to only play and not to record. This resulted in my having to spend two full days correcting the errors committed in a one-day hearing trip. Every hearing had to be rescheduled, with a letter to every claimant, explaining the reason they must undergo the ordeal of another hearing.

Having done all this, I telephoned our Dallas Regional Office to ask if we could reschedule the hearings along with another docket of cases if we could provide a cost-comparison showing it would be more cost-efficient for me to travel instead of using a contract hearing reporter. This request was denied (attachment 3). Also denied was my request for approval of travel expenses for the claimants to come to a supplemental hearing as the result of having to use an incompetent and unqualified hearing reporter. Instead, I was told by an employee of the Regional Office that I must be (and I quote) "more understanding and considerate of the poor thing (hearing reporter); that she doesn't know what she is doing and that she is only doing "her thing." I cannot state too clearly that the hearing room where people are severely physically and mentally disabled is no place for a person to "do her thing". We see so many people who have mental problems that require special attention; those people who have physical problems that are so personal in nature; and those people who are illiterate but proud and do not want anyone to know. You cannot imagine the fright that these people experience coming to their hearing. We have had some almost in cardiac arrest; some undergo seizures during the hearing; men and women that break down and cry; and some who feel the whole world is against them. Can you imagine the terror these people feel? They need to be reassured and confident that their files will be kept condifential; they need to feel they are getting the fair, impartial and confidential hearing that they requested.

Again, I thank you for the opportunity to be here today and to be heard.

Refer to: SGE3

Memorandum

Date: DEC 1 1982

From: Chief Administrative Law Judge

Subject: Curtailing Hearing Assistant Travel

To: Regional Chief Administrative Law Judges
Regional Management Officers
Administrative Law Judges in Charge

As you recall, in November 1981, the Associate Commissioner issued a memorandum which established guidelines for operating under tight budgets resulting from continuing resolutions. That memorandum stated that all hearing assistant travel should be discontinued and that WAEs should assist ALJs at hearing sites away from the hearing offices. Since that time you were also instructed to seek the assistance of a DO/BO employee when a WAE is not available at a hearing site.

Based on the number and types of requests for exceptions to this policy that have been received in Central Office, it appears that some field personnel are not making a sufficient effort to schedule travel cases in conjunction with the availability of WAE or DO/BO assistance. I understand the difficulty of scheduling hearings in such a way as to maximize hearing office efficiency while at the same time having to rely on the availability of WAE or DO/BO personnel. However, I believe that this can be done in most cases if field personnel adhere to the following guidelines.

(1) Before an ALJ's intinerary is set, the availability of WAE or DO/BO personnel should be ascertained and cases scheduled, to the extent practicable, at those times.

(2) Hearing offices should avoid scheduling cases for two ALJs at the same hearing site at the same time. For example, an ALJIC should assign all cases to be held at the site to one ALJ until he or she has a complete docket of hearings. In so doing, arrangements will have to be made with only one WAE or DO/BO employee per hearing site at a given time.

(3) Central Office approval of hearing assistant travel should be requested before an itinerary is set and the notices of hearing are mailed so as to avoid rescheduling and renotifying claimants in the event the request is denied.

When approval of a request for hearing assistant travel is received, each hearing office must take measures to ensure equity and fairness in the selection of the traveling hearing assistant. In reconfigured hearing offices, a rotational system for hearing assistant travel must be followed so that each hearing assistant has the opportunity to assist at hearings away from the hearing office. In offices operating under the unit system, the hearing assistant assigned to the traveling ALJ's unit will be selected for travel. Of course a qualified, fully experienced hearing assistant must be used to train new WAEs at the hearing sites.

Only in the most unusual circumstances will interregional hearing assistant travel be approved. It is the responsibility of the office requesting assistance to follow the aforementioned guidelines in providing assistance for the visiting ALJ.

Please make sure that all ALJs and hearing office managers are aware of and follow these guidelines. If you have any questions, please refer them to Dave Wells at 235-3502.

Thank you for your cooperation in this regard.

Philip T. Brown

Philip T. Brown

DEPARTMENT OF HEALTH & HUMAN SERVICES
Social Security Administration

Refer to:
SSE2

Office of Hearings and Appeals
PO Box 2518
Washington DC 20013

OCT 4 1983

Honorable J. J. Pickle
Chairman, Subcommittee on
Social Security
Committee on Ways and Means
House of Representatives
Washington, D.C. 20515

Dear Mr. Pickle:

This is in response to your letter of August 22 to former Commissioner Svahn on behalf of Administrative Law Judge (ALJ) Noe Garza who has expressed concern about our hearing reporter program. Please accept my apology for the delay in responding.

As I explained to ALJ Garza in a recent letter, the decision to utilize contract services to monitor hearings away from the hearing office came as the result of a critical shortage of hours appropriated to a former program in which we utilized When Actually Employed (WAE) personnel. Individuals employed under this earlier program were Federal employees who worked on an as needed basis. After studying alternatives to the WAE program, we decided that obtaining contract services was the most cost-effective and feasible option available to us.

I appreciate ALJ Garza's interest in using hearing assistants to aid ALJs at hearing sites. However, using other means of providing such assistance has resulted in a substantial savings in program travel costs. In fact, our latest analysis reveals that the former WAE program saved us approximately $2 million annually, and I believe we can expect similar results from the contract hearing reporter program. In addition, of course, the program permits hearing assistants to remain in the hearing office and prepare additional cases for hearing. With proper training of contract reporters we should be able to reduce or eliminate the problems described by ALJ Garza. In fact, many ALJs have indicated satisfaction with the competent performance of hearing monitors, both WAEs and contract reporters, at hearing sites. Moreover, I remain convinced that hearing assistants' skills and time are better utilized in the hearing office to prepare cases than at hearing sites to monitor hearings.

ATTACHMENT 2

I hope this information is helpful to you. Similar information has been provided to Representatives Ortiz and de la Garza who also inquired into this matter.

Sincerely yours,

Louis B. Hays
Associate Commissioner
Office of Hearings and Appeals

MEMORANDUM

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION

O : Regional Management Officer
OHA, Dallas Region

DATE: November 29, 1983

ROM : Jerry Thomasson, ALJIC
Fort Smith, Arkansas

UBJECT: Request for Hearing Assistant/Hearing Clerk Travel to Assist in Hearings

ALJ Jerry Thomasson HA/HC Minnie E. Dormois

An itinerary may be attached in lieu of providing the following information.

1. Hearing Site Address(s): Federal Bldg. Harrison, AR

   Date: Date: Date:

2. Schedule :
   Date 12-14-83/(afternoon) in travel status. Hearings Begin: End:
   Date 12-15-83 Begin: 8:00AM End: 5:15PM
   Date 12-16-83 Begin: 8:00AM End: 2:30PM
   In travel status for return.
   Date Begin: End:
   Date Begin: End:

3. Number of Hearings Scheduled: 18

Comments/Justification:

See attached sheet

Requested by: Jerry Thomasson
Jerry Thomasson, ALJIC

APPROVED BY CENTRAL OFFICE

Date:

- The Regional Commissioner has secured District Office assistance. Please contact the following employee(s) prior to the hearings:

ATTACHMENT 3

Request for hearing assistant travel is made because of the following reasons:

1. Hearing reporter resides in Berryville, Arkansas. Approximately seven (7) of the 14 hearings scheduled on the attached sheet reside either in Berryville or on route outside Berryville. Hearing reporter in these 7 cases, possibly in more, would want to disqualify herself as reporter because of personal knowledge of claimant and conflict of interest. The hearing reporter in Berryville is also working on an almost full-time basis, with an agency that services the elderly and disabled in their homes; the agency, Beverly Enterprises (or Leisure Lodge), excuses the hearing reporter on the days scheduled for hearings. On these 7 cases, the ALJ would have to act as own hearing reporter.

2. The Fort Smith, AR Office (hearings and appeals), presently has(5) five hearing assistants and 3 hearing clerks as support personnel. There are no hearing clerks available for travel. The overtime incurred in the Fort Smith, AR Office at the present time is primarily allotted and used by the hearing clerks.

3. District Office personnel is not available for hearings.

4. Cost comparison shown below reflects it would be more cost effective for hearing assistant to travel with ALJ and assist at hearings:

HEARING REPORTER AND ALJ (Contracted out hearing reporter):

Air fare for ALJ---------------------$ 71.00
Rental car in Harrison (2½days)------$ 58.00
ALJ per diem (2½ days)---------------$125.00
Hearing reporter salary -------------$112.00
Parking of ALJ POA (airport)---------$ 7.50

$373.50

HEARING ASSISTANT AND ALJ (travel with ALJ in rental car):

Rental car ($17.00 day + .17 mi.)----$111.00
Per diem for ALJ----------(2½days)---$125.00
Per diem for H/A----------(2½days)---$125.00
Parking of ALJ POA (airport)---------$ 7.50

$368.50

HEARING ASSISTANT AND ALJ (travel in H/A's POA):

Mileage for H/A's POA (20.5 per mi)--$ 87.50
Per diem for ALJ----------(2½days)---$125.00
Per diem for H/A----------(2½days)---$125.00

$337.50

This is most cost effective. If approved, this mode of travel would be used.

ITINERARY AND SCHEDULE OF HEARINGS*

Jerry K. Thomasson
ADMINISTRATIVE LAW JUDGE

Minnie E. Dormois
HEARING ASSISTANT

December
MONTH

1983
YEAR

EMERGENCY ADDRESS OR PHONE
Harrison, AR D/O: 741-7676

DATE	TIME	CLAIMANT	Account Number	Type of Case	VE, MA, and/or Atty	Place of Hear. Bldg. & Room N
12-14 Wed.	Dev 3:30PM	RAMSEY, Peggy	429-72-8457	DIB/SSI (Ct. Rem.)	Ken Reeves, Atty. (allow 2½ - 3 hours)	Federal Bldg. Rm. 235 Erie & Walnut St Harrison, AR
12-15 Thurs	Dev 8:30AM	BOHANNON, Earl	429-32-0153	DIB		
	Ready 9:15	RICHARDSON, Joe	431-34-4176	DIB Cess.	Karen Walker, Atty.	
	Dev. 10:00	WILSON, Valerie L.	523-74-6046	DIB/SSI	Donald J. Adams, Atty.	
	Ready 10:30	PAXTON, Jessie (Mr)	432-50-0808	DIB Cess.	Bonnie Nunes, Paralegal	
	Dev 11:15	BAKER, Eula Mae	432-13-6889	SSI	Bonnie Nunes, Paralegal	
	Ready 1:00PM	NIESSINK, Laurel J	341-24-5730	DWB		
	Ready 1:30	PERDUE, Billy M.	454-32-5388	DIB	Rick Spencer, Atty.	
	Dev. 2:30	PERRY, L.D.	430-56-5222	DIB/SSI (Ct. Rem.)	Rick Spencer, Atty.	
	Ready 3:15	BROOKS, Raymond	432-24-3722	DIB Cess.	Rick Spencer, Atty.	
	Dev. 4:00	CHIASSON, James L	436-56-7279	DIB	Rick Spencer, Atty.	
12-16 Fri.	Ready 8:00AM	HORTON, Mattie R.	431-42-4295	DIB/SSI Cess.		
	Ready 9:00	DAVIS, Melba E.	431-80-6288	DIB Cess.		
	Ready 9:30	ROTKOWSKI, Ronald	277-46-3185	DIB Cess.		
	Dev. 10:00	MATHIS, Burl M.Jr.	432-80-8685	DIB Cess.	Donald Bishop, Atty.	
	Ready 10:30	WHEELER, Harold D.	457-38-9491	DIB	Donald Bishop, Atty.	
	Ready 11:00	RICKETTS, Iva L.	500-38-5573	DIB Cess.	Jerry Pinson, Atty.	
	Dev 11:30	WAGONER, Terry L.	566-88-8444	DIB Cess.		
	Ready 12:15PM	THORNTON, Robert F.	345-12-8448	DIB		

(in travel status for return to Fort Smith, AR)

ALJ APPROVAL JT

MEMORANDUM

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION

TO : Jerry Thomasson, ALJIC
Fort Smith, Arkansas

DATE: February 6, 1984

FROM : Regional Chief Administrative Law Judge
OHA, Region VI, Dallas

SUBJECT: Request for Approval for Hearing Assistant Travel

With regard to your request for approval for your Hearing Assistant to accompany you to Russellville, AR, on February 15, 1984, for the purpose of assisting in hearings, please be advised that such request was disapproved, as previously conveyed to you by telephone.

Attached for your information is a copy of the memorandum dated November 15, 1983, from the Director of the Office of Field Administration, on the policy regarding support staff travel to monitor hearings. Also attached is a copy of the memo dated December 1, 1982, from the Chief Administrative Law Judge, regarding the curtailment of Hearing Assistant travel.

Harold G. Adams

Attachment

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

Refer to: SGE2

Memorandum

Date: NOV 15 1983

From: Director, Office of
Field Administration

Subject: Policy Regarding Support Staff Travel to Monitor Hearings--INFORMATION

To: Regional Chief Administrative Law Judges
Regional Management Officers
Administrative Law Judges in Charge

On December 1, 1982, the Chief Administrative Law Judge issued guidelines which set out the procedures concerning the usage of WAEs and the discontinuation of hearing assistant travel (Tab A). While we now use contract hearing reporter services in place of WAEs, there have been no other changes in the procedures which were outlined in the Chief Judge's memorandum of December 1. There should now be very little, if any, hearing assistant travel. Any anticipated hearing assistant travel must be requested through OFA, Central Office for approval, prior to authorization.

Since Chief Judge Brown's memorandum of December 1, 1982, a new standard position description for hearing assistants has been issued. This new position description raises the journeyman grade for the hearing assistant position from GS-7 to GS-8. This should eliminate many of the problems you were having regarding the number of GS-8 hearing assistants you could have in an office. The monitoring of hearings was removed from the PD because it was not grade controlling and, from a classification viewpoint, did not enhance the GS-8 grade level.

The PDs for hearing clerks, legal clerks, and clerk typists should be revised to include the monitoring of hearings. These individuals should perform travel when necessary. (Some regions have already begun to revise the PDs and have begun to train these employees on how to monitor hearings in the event that hearing reporters are not available. Those regions which have not begun such actions should do so as soon as possible.)

If you have any questions pertaining to this policy, you can refer them to Dottie Costen or Dave Wells at 235-3502. Thank you for your cooperation in this regard.

Ed Steinman

Edward D. Steinman

Attachment

DEPARTMENT OF HEALTH & HUMAN SERVICES Social Security Administration

Refer to: SGE3

Memorandum

Date: DEC 1 1982

From: Chief Administrative Law Judge

Subject: Curtailing Hearing Assistant Travel

To: Regional Chief Administrative Law Judges
Regional Management Officers
Administrative Law Judges in Charge

As you recall, in November 1981, the Associate Commissioner issued a memorandum which established guidelines for operating under tight budgets resulting from continuing resolutions. That memorandum stated that all hearing assistant travel should be discontinued and that WAEs should assist ALJs at hearing sites away from the hearing offices. Since that time you were also instructed to seek the assistance of a DO/BO employee when a WAE is not available at a hearing site.

Based on the number and types of requests for exceptions to this policy that have been received in Central Office, it appears that some field personnel are not making a sufficient effort to schedule travel cases in conjunction with the availability of WAE or DO/BO assistance. I understand the difficulty of scheduling hearings in such a way as to maximize hearing office efficiency while at the same time having to rely on the availability of WAE or DO/BO personnel. However, I believe that this can be done in most cases if field personnel adhere to the following guidelines.

(1) Before an ALJ's intinerary is set, the availability of WAE or DO/BO personnel should be ascertained and cases scheduled, to the extent practicable, at those times.

(2) Hearing offices should avoid scheduling cases for two ALJs at the same hearing site at the same time. For example, an ALJIC should assign all cases to be held at the site to one ALJ until he or she has a complete docket of hearings. In so doing, arrangements will have to be made with only one WAE or DO/BO employee per hearing site at a given time.

(3) Central Office approval of hearing assistant travel should be requested before an itinerary is set and the notices of hearing are mailed so as to avoid rescheduling and renotifying claimants in the event the request is denied.

When approval of a request for hearing assistant travel is received, each hearing office must take measures to ensure equity and fairness in the selection of the traveling hearing assistant. In reconfigured hearing offices, a rotational system for hearing assistant travel must be followed so that each hearing assistant has the opportunity to assist at hearings away from the hearing office. In offices operating under the unit system, the hearing assistant assigned to the traveling ALJ's unit will be selected for travel. Of course a qualified, fully experienced hearing assistant must be used to train new WAEs at the hearing sites.

Only in the most unusual circumstances will interregional hearing assistant travel be approved. It is the responsibility of the office requesting assistance to follow the aforementioned guidelines in providing assistance for the visiting ALJ.

Please make sure that all ALJs and hearing office managers are aware of and follow these guidelines. If you have any questions, please refer them to Dave Wells at 235-3502.

Thank you for your cooperation in this regard.

Philip T. Brown

MEMORANDUM

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION

O : Regional Management Officer
OHA, Dallas Region

DATE: January 23, 1984

OM : Jerry Thomasson, ALJIC
Fort Smith, Arkansas

JBJECT: Request for Hearing Assistant/Hearing Clerk Travel to Assist in Hearings

ALJ Jerry K. Thomasson HA/HC Minnie E. Dormois

An itinerary may be attached in lieu of providing the following information.

1. Hearing Site Address(s): Russellville, AR

Date: 2-15-84 Date: Date:

2. Schedule : Date 2-15-84 Hearings Begin: 9:30AM End: 2:30PM
Date Begin: End:
Date Begin: End:
Date Begin: End:
Date Begin: End:

3. Number of Hearings Scheduled: 6

Comments/Justification:

1. The six (6) hearingsscheduled are APPEALS COUNCIL REMANDS WITH VOCATIONAL EXPERT TESTIMONY required in each hearing. This request for hearing assistant travel is being made because of the difficulty that will be encountered and the need for experienced assistance.
2. Hearing assistant will travel with ALJ in rental vehicle - no additional expense will be involved for H/A travel.
3. Without experienced H/A assistance, per diem will be involved for ALJ (hearings take longer without experienced assistance).
4. Hearing clerk assistance not available.

Requested by: Jerry Thomasson

APPROVED BY CENTRAL OFFICE

Date:

The Regional Commissioner has secured District Office assistance. Please contact the following employee(s) prior to the hearings:

Mr. **Anthony** [presiding]. Thank you so much for your testimony. I would like to have stated for the record a quick history of how long each one of you have been in the ALJ program.

Mr. **Thomasson**. I've been an administrative law judge for 13 years.

Mr. **Anthony**. Judge Mayhue?

Mr. **Mayhue**. Twelve years, sir.

Mr. **Anthony**. Twelve years.

Mr. **Hubbard**. Ten years.

Mr. **Anthony**. Ten years. Could you go back to any particular point in time, as a reference for the committee, as to when these problems started as far as the harassment, the intimidation, and the placement of the quotas?

Mr. **Thomasson**. In 1981.

Mr. **Mayhue**. I think Judge Thomasson has reference to the Bellmon amendment and the implementation by the administration, using that amendment, that set up the review process. Using that amendment to try to put themselves in a position to come back to you gentlemen and say, look what we've done—we've taken all these people off the rolls, we've saved all this money. And, then the idea came forth—well, if we can keep the administrative law judges from putting so many people on disability in the first place or reinstating them by putting them under quotas, that's what we'll do. And, that's exactly what they've done.

Mr. **Anthony**. Judge Mayhue, I understand that the Congress was concerned about the growing problem of the disability program and the swelling of the rolls. Upon reflection after the amendments were passed into law, don't the numbers show that the opposite was happening, that the number of claims was beginning to dwindle? Who knows why, but weren't they beginning to dwindle?

Mr. **Mayhue**. You mean people that were being put on?

Mr. **Anthony**. Put on the rolls, yes.

Mr. **Mayhue**. Well, there are several reasons for that, we believe.

Mr. **Anthony**. For the record though, didn't we find out afterward that the numbers were really going down rather than going up after we passed the law?

Mr. **Mayhue**. Yes. I believe so.

Mr. **Anthony**. So, in a way the Congress was trying to address what they perceived to be a problem and the problem was correcting itself. If I understand what all four of you have said, it is that the administration has taken the intent of Congress, which was to try to take a reasonable take a look at a Government program, and have arbitrarily and capriciously operated it through force and intimidation. The comments that you have made publicly for the record and also in your lawsuit, show the administration trying to achieve another goal. Is that basically what we're hearing loud and clear from you today?

Mr. **Thomasson**. Yes, and you might add ruthlessly and recklessly to that.

Mr. **Anthony**. Ruthlessly and recklessly. We definitely would not call you uncommitted if we were out campaigning.

Mr. **Mayhue**. Not only has it affected the review process, but it has also affected the initial applications, those folks that are becoming disabled and are applying. The same standards apply—on us apply to the new people, people that have never been on disability.

If we hear one case at a time, decide one case at a time on its own merits, the current administration is so refining the rules that they're not even publishing regulations any more. They just say, this is our policy and it's binding on you. They call those social security rulings. And, there's no input from anybody other than the bureaucrats in Washington.

Mr. ANTHONY. Well, you've led me right into the question that I was going to ask the panel. You feel, then, that the rulings that are made by the Social Security Administration definitely impact on your impartial decision making capability?

Mr. MAYHUE. Absolutely. And, I think that practice is the most unconstitutional practice.

Mr. ANTHONY. Do you have a recommendation for Congress as to how to correct that?

Mr. MAYHUE. Make governmental agencies go through the rule making procedure that has been set up by Congress, publish their proposed regulations, have input from——

Mr. ANTHONY. Have public comment and when they're published, everybody knows to go by them.

Mr. MAYHUE. These things are secret. They're secret.

Mr. ANTHONY. These are the POM's?

Mr. MAYHUE. The POM's and the SSR's, Social Security rules.

Mr. ANTHONY. And, the SSR's, yes. Our subcommittee has gone up to Baltimore and we've had a very nice briefing from Martha. Mr. Pickle asked very forcefully what this would do to the SSA if the Congress required them to put everything into regulations rather than doing the rulings and SSR's. They said it would slow them down, throw them into chaos and that they couldn't do it. They started wringing their hands, sort of like some of the clients that these lawyers were talking about. They were almost in tears thinking the Congress couldn't do that could it?

What do you think would happen if the Congress did that? Would it throw the system into chaos—could they operate with it?

Mr. THOMASSON. Yes. Easily. They've got 76,000 employees and they would be able to handle it. If I could give you an example of the POM's business, Congressman, yesterday I had a hearing involving a 93-year-old woman who could not read or write. She was taken off SSI because they found she had a one-ninth interest in 107 acres of land.

She was taken off SSI. She had been on SSI, and it's predecessor State program, 28 years. She was taken off without a hearing. The U.S. Supreme Court in the case of *Goldberg* v. *Kelly* said that you must give this type person a hearing before ceasing their benefits.

Social security has a POM's section that says *Goldberg* v. *Kelly* doesn't apply if it's a nonmedical case. Well, there's been no legal distinction of *Goldberg* v. *Kelly* in that fashion. So, the POM's are written in secret by someone in Washington to say whatever social security wants to say and here's a case where it goes against the U.S. Supreme Court decision. And, that's the way they are.

I suggest that all the POM's be expunged from the record and start over again with somebody rewriting according to law.

[Applause.]

Mr. **Anthony.** I guess I'm going to have to agree with Mr. Thornton. You do need to be annointed into sainthood. Personally I'd like to thank you for your courage. I happen to be a member of the bar, and I would hate it if the Government ever got in the position where it could tell any court system that they had to find a particular verdict of guilty or not guilty in a certain percentage of the cases. Not only would we have anarchy but I think we could just take the basic U.S. Constitution and shred it to pieces.

I want to commend you publicly. I think you've presented some very, very forceful testimony and it's going to help our public record. I think we can cite some of your statements when we go to the House floor in hopes that we can convince the majority of the House Members to try to at least do what little we think needs to be done right now. Hopefully Senator Pryor can then take that piece of legislation and shame the administration into supporting it over on the Senate side.

I yield at this time for questions from Senator Pryor. I want to thank you very much for your testimony.

Senator **Pryor.** If I mention the name to you, ladies and gentlemen, of John Svahn, does that ring a bell? Just so the audience will know about Mr. Svahn. In the Congress and very basically there was very little debate, if any, on the Bellmon amendment.

I don't think there was a separate vote on the Bellmon amendment. It was written like, well, let's have a review and make certain that we don't have those people drawing disability who don't deserve disability. All of us agree with that. I think you, as administrative law judges, agree with that. I certainly agree with that.

But Mr. Svahn was chosen to implement this program, and he implemented it in such a way that it was, in my opinion, probably one of the worst governmental abuses of power that our country has ever seen. And because he had done such a good job and taken so many people, in my opinion so many deserving people, and removed them from the disability rolls and had brought total chaos and ruination to this system, he was promoted, not demoted to Under Secretary of HHS.

I just want you four and this audience to know that I attempted to block his confirmation. I only received four votes to block his confirmation in the Finance Committee, Congressman Anthony. We took the issue to the floor and I only convinced 10 of my colleagues in the Senate that he should not be confirmed as Under Secretary of HHS. He was confirmed.

And, now he has moved from that position to another promotion as domestic counselor to the President. I just wanted the record to show not only of my displeasure with the program but also some of the individuals who have, I think, grossly abused what the Congress intended when it required triannual reviews of the nonpermanently disabled.

And, all of the questions that I had prepared for these administrative law judges, Congressman Anthony, have been answered by their own statements and I would just like to say that we really owe you a debt of gratitude for what you have done.

I hope Monday morning that you will still have a job. [Applause.]

Mr. ANTHONY. The Chair thanks you. You've made a substantial contribution to the record at this hearing and we are indebted to you for that.

This concludes the witnesses that had requested to be heard. We have a few minutes. Senator Pryor's time and my time are not quite as close as Chairman Pickle's. He did have to get back to Washington, DC. I have a feeling he'll probably be back issuing a few more press releases, especially after the excellent testimony we've heard today.

We have a little extra time. If there are claimants in the audience who would like to be heard, we would like to leave the record open for a few moments to allow you that opportunity. At this time if there is a claimant if you would raise your hand we will assist you in coming up to the table.

Senator PYROR. There's a claimant right there, Senator Canada.

Mr. ANTHONY. If you would please, give your name—of course, I know Senator Canada, but if there are any claimants that would like to take 5 minutes we will operate under the 5 minute rule on this portion of the program. And, a very strict adherence by the way on the 5-minute rule.

If the staff could take names of anybody who is out there—this will be your opportunity to speak. This is one of the reasons, ladies and gentlemen, that we try to bring hearings to the people—so that you don't have to go to Washington, DC, to tell your Members of Congress how you feel about a particular issue.

This truly is trying to bring Government to the people—to save you the expense and the trouble of going to Washington, DC. Senator Canada, are you going to be with this witness, or do you have something separate that you would like to say? We recognize you for 5 minutes at this time.

STATEMENT OF HON. BUD CANADA, SENATOR, GARLAND AND MONTGOMERY COUNTIES, ARKANSAS STATE LEGISLATURE

Mr. CANADA. Thank you, Congressman. I just wanted to add a few words of testimony, if I may, Senator Pryor. Yes, I'm with her. [Referring to Mildred Thompson.] And, I'm very happy to be with her, and she has some very pertinent testimony that I'd like for you to pay close attention to. But I'll only take 1 minute of my 5.

Mr. ANTHONY. You're recognized.

Mr. CANADA. In my local office here as you know that I represent Garland County and Montgomery County as my senatorial district. And, in the last year to year and a half you would not believe the traffic—and I don't use that word in context but you wouldn't believe the amount of visitors I've had on this one subject in my office, almost daily—almost daily.

And, I don't know—I'm not an attorney, I don't know of another situation in jurisprudence, in my opinion, where something is cut off without a hearing process. And, I know that you all are very busy and I have a great deal of respect for you, and I know you both very personally—you know this. But I'm here in Hot Springs and I see these people every day and they're my friends and they're my constituents, and when they come—some of them that, the nonpermanent injury type that come in my office they're absolutely in shock to learn that they have been cut off without review. They don't know why they're been cut off.

And, they have bills to pay like everyone else. They have children in school. They have utility bills and they have many other things. And, they're completely dependent on this. And, it's something that is not welfare—they have earned it. They have absolutely earned it.

And, so with your permission I wrote up a few words here and I'm only going to read the last paragraph, if I may.

Mr. Anthony. You're recognized.

Mr. Canada. Thank you so much. This is a humanitarian appeal to the Arkansas congressional delegation to call for the redefinement of the eligibility requirements or provide closer scrutiny of the authorities making the final decisions and writing the final rules in Washington.

I hereby pledge my wholehearted support to any State level action aimed at bringing about changes in a program that would result in a more sensitive criteria for case review. I commend you for the bill that you've written. I'm in complete agreement with it. It's a good bill and I wish you a great deal of success in the passage of it.

And, would you please call on me in my office for any assistance that I can give you, or Senator Pryor. We appreciate this hearing.

Mr. Anthony. Thank you very much, Senator Canada.

Senator Pryor. Thank you, Senator Canada.

Mr. Anthony. Our next witness is Mildred Thompson, who has asked to be heard. She is a paralegal. She represents claimants and she resides in Lewisville, AR. Ms. Thompson, you'll be recognized for 5 minutes.

STATEMENT OF MILDRED THOMPSON, LEWISVILLE, AR

Ms. Thompson. Thank you, Congressman Anthony, and Senator Pryor.

In November, I submitted a position's statement to Senator Pryor and Congressman Anthony, along to Mr. Bumpers, Gov. Bill Clinton, and all of the legislators of Arkansas. I am sure that they have it somewhere on some of their desks. I thought that I brought one. I told Mrs. Tucker that I would. Evidently it's in the car or at the office.

But I'm sure that Senator Pryor will find his and pass it on to Mrs. Tucker.

Mr. Anthony. Without objection the record will be left open. We will provide a copy for the transcript.

Ms. Thompson. OK, but I represent a segment of people that never gets in to see a lawyer. And, in some cases they can't even get to our Legal Service Offices. These people, if they are SSI recipients or potentials, in the area where I live we don't have lawyers that will take the time out with SSI recipients.

Now we do have lawyers that take on Social Security hearings, and these SSI recipients are left to the mercy of the Social Security Offices. And, I have heard statements today about our district, and I would like to say something about the local offices that we have—

not all, but 99 and a half of those people are not sensitive to the needs of our recipients.

Some of them go in and they come out more baffled than they did before they left home. They have discontinued the collect calls. They send the forms out and in some instances the recipient cannot read. And, I have questioned this and said, OK, if they cannot read what do you plan to do. Take it to a neighbor—suppose the neighbor can't read. The form is left there and nothing is done about it.

I've heard suicide attempts. We in Lafayette County now is facing that. I know Mr. Anthony. I talked to Mr. Pickle and also the lady on your staff there. I talked to Mr. Pryor, Fred Allen and I talked to the person that you have at SSI—I mean that deals with social security, trying to go around this bureaucracy that you have to go through.

Because it's very dismal when, for four or five times you have come up for hearing and denied, then here you go back again. I have got acquainted with Mr. Kearney's staff. A couple of weeks ago I was very, very disillusioned with a recipient and I had talked to Mr. Winkle, I was so sure that this man, this time, was going to be able to receive his award.

But he did not. You know, I don't know why an individual's family doctor that says that a person is not able to work, that they will not take that. Somewhere and somehow that we have got to get doctors, Social Security or somebody has got to fire these doctors that's saying that these people can work.

And, you might as well face it. If you are 50—back down to 40, you got one foot in the grave and the other one on a banana peeling. They are not going to award you an award. Because they're looking at age. And, I heard one of the men here today mention something that if you put Social Security up, who knows when they're going to get sick. When you started Social Security you're not for sure you're going to wait until 65 or 62 to receive benefits.

Why can't people receive that money that they have worked so hard and put up there for? I'm sure if our Social Security recipients today could receive the publicity that Mr. Meese is getting, that we would have some changes. Thousands and thousands of dollars is being spent. When people break the law, who pays for it? Taxpayers pay for it.

But when something as important as this—it doesn't get on the media that much. We have hearings but I'm afraid if something doesn't happen we're going to be right back next year where we are now, with more people either committing suicide or starving to death.

And, right there I'm going to stop and say that I appreciate you letting me come here today. We left home at 6 o'clock this morning. We live in Lewisville, and that's not around the corner. I have testified at Congressman Anthony's hearings before and I'm not anything new to him. And, I'm not anything new to Mr. Pryor either.

But, I want to say that prayers change things. I definitely believe that if America could go down in prayer that a lot of things could be changed.

And, until we do we are still going to be here bucking and trying. Thank you, and God bless you.

Senator PRYOR. Thank you very much.

Mr. ANTHONY. Thank you.

Senator PRYOR. Are there others who would like to make a statement?

Yes, sir, go ahead.

STATEMENT OF PAUL MICHAEL EVANS, HOT SPRINGS, AR

Mr. EVANS. My name is Paul Michael Evans. I reside here in Hot Springs. I've contacted Senator Pryor's office. I've contacted Congressman Anthony's office, and they've given me assistance so far. I'm going up before an administrative law judge pretty soon.

I broke my back in 1980. I didn't have any insurance. I went to the VA hospital. They inserted two steel rods in my back. Three years later the rods broke. I went to the social security doctor. The rods were broken at that time. They were 12-inch rods that went from my pelvis up to my fifth vertebra, and darned if they didn't say, "you're allright son, you've got two broken rods in your back but go on out there and go to work. You're allright."

And, it's just a little bit aggravating to have that kind of condition. I've got nerve damage in my back and everything. And, the VA doctors, which to me are Government doctors, I'm thankful they are there. I think they did an excellent job and I would go to them for anything that ever happened to me. But they're on the side of the bureaucracy as far as I'm concerned in telling social security that a person is able to work or if he is disabled.

And, I don't feel that I am. I've got the pain. I've got the hurt. I can walk from here down to the end of the building and I'm in bad pain. Nobody wants to believe that, even the doctors over there. They want to give you these little mental tests that ask you if you hated your mother or why you had nightmares, or why you wet the bed and all that kind of good stuff. And, you know, they think that's going to tell me or them where the pain's coming from. The pain is there. It's not in my head—I feel it.

And, I feel that something needs to be done about this.

Senator PRYOR. Have you been told by social security what type of job you could hold down?

Mr. EVANS. Oh, sure, I can get out there and lift 10 or 20 pounds and collect change at a gas station, but I'm not able to put in 8 hours. I've been in construction all my life. That's what I know. My wife works. She makes $110 a week cleaning houses to support us, and that's what we've done since 1980. We've made it. I haven't drawn a food stamp. I haven't drawn SSI. I haven't asked anybody for anything. I've had help from my family to help make it this far.

And, there's times that I thought that suicide—my family would be better off if I did commit suicide, but I'm too much of a Christian to do that. And, I'm not going to let it get me down. I'm not going to let the system beat me. But I feel the system needs some changes, and I really appreciate what you gentlemen are trying to do today.

Thank you very much.

Mr. ANTHONY. Thank you, Mr. Evans.

Senator PRYOR. We thank you very much for that statement. [Applause.]

Mr. ANTHONY. If you would, please state your name and address.

STATEMENT OF DELBERT LEWIS, LITTLE ROCK, AR

Mr. LEWIS. My name is Delbert Lewis, 106 Riverside Drive, Apartment 45, in Little Rock. I appreciate this opportunity now that you've opened the floor. I especially appreciate Senator Pryor when he was Governor. He gave me many opportunities to explore the world that have colored my perspective in a way that I would like to bring to your attention.

The statement was made that only people who are disabled should come under the program. I respectfully suggest that it is not correct. I'm sure that it was meant that the only people who are legitimately disabled to work should receive benefits.

Gentlemen, I have met many SSDI/SSI recipients; perhaps only 20 percent of the recipients of Federal financial assistance who are unable to do any kind of work. I use a wheelchair and am a former social security disability beneficiary. I received aid to the permanently and totally disabled prior to SSI. I attempted suicide about 2 years ago. I stayed in the State Hospital for awhile and received no appropriate services or understanding of my disability and special needs.

With the support of my employer and my family I am continually able to work at least for a few more years. I am employed and I thoroughly enjoy my work. The problem is that it is not with the disability that prohibits a person from employment. The problem is in the environment.

Some people (beneficaries) may have bad attitudes, they may need counseling, they may think they cannot work. There are enumerable issues subjective within the person. But I respectfully submit that it is things outside the individual, the environment, the physical access, the lack of support services, the lack of attendant care, inflexible personnel policies, the tax penalties that we have to pay that are the real disincentives to work.

I have been audited by the IRS every year since 1972, because of legitimate business related expenses, which have been disallowed. If I were not working I would get everything—wheelchair, lift, special care, and so forth—free. Professional estimates indicate that a person must make $20,000 a year just to make up for the Government benefits lost by working—for example cash payments, SSI, SSDI, food stamps, commodities, the HUD rent subsidy, equipment, and most of all medicare and medicaid payments. These are tremendous disincentives to employment.

That is where the problem lies. Cash payments in the form of disability payments are necessary, desperately necessary at this time, and for some people such as the terminally ill, the profoundly disabled who legitimately cannot ever work will always be necessary.

But I can say as a fact that the people that I know, admittedly younger, disabled, severely disabled people are less severely disabled than I am, are not working and are receiving benefits. There will soon be a time in my life when I will be simply priced out of the labor market, because I am loosing money every year because of high gasoline prices, taxes, everything from inaccessible apartments, inaccessible environments, driving all the way across town to find the one wheelchair accessible place, and so forth. It's a million, billion, miniscule, nit-picking things like this which cannot be addressed at this time, that are serving as the disincentives for employment thus making people dependent on the able bodied and Public Treasury.

In conclusion, I respectfully submit that the greatest problem in rehabilitating long-term disabled people who are and have been receiving benefits, is surmounting the problems faced in the environment, especially having secure "fall-back income," continuing medical benefits, attendant and support services, accessible housing, flexible employment and personnel policies, civil rights, and so forth, and all the counseling in the world will not change the environment.

Rehabilitation can never be totally successful without meaningful, permanent changes in every aspect of the environment, removal of barriers, cessation of building new barriers and aggressive enforcement of laws we do have.

Thank you gentlemen.

Mr. Anthony. Thank you very much, Mr. Lewis. I don't see any other witnesses that have asked to be heard.

I recognize Senator Pryor at this time for any closing comment that he may have.

Senator Pryor. I have none except just to thank once again those who made the preparations for our visit, and to thank all of you who have driven from a long way and some locally to come today. And, I can assure you that the statement that we have, the record that we have made of this hearing will be given to the Members of the Ways and Means Committee on Congressman Anthony's committee, and to the Finance Committee, to the Aging Committees in each House, and ultimately to our colleagues in the House and Senate.

Your testimony has been very valuable and some of it very moving I might say, and thank you very, very much for participating.

Beryl?

Mr. Anthony. Thank you very much, Senator Pryor, for joining the Social Security Subcommittee with your Special Committee on Aging. I think having your committee represented here has helped us establish a broader record, rather than having it go back only to the House of Representatives. Any corrective legislation obviously has to pass both bodies.

I would like to thank all the participants in the audience and those people who have made this day possible, and the facility possible for us. On behalf of Mr. Pickle, the chairman of the Social Security Subcommittee, and all the other members of the Ways and Means Committee, we thank you. We think an excellent record has been established. We can look forward to seeing what the administration does come out with on Monday.

We can debate the legislation that I have cosponsored on Tuesday. I hope that we can make a strong case, representing the views you have given us today. I hope 218 Members of the House of Representatives agree with us, and we can pass the legislation and send it over to the Senate.

And, with that the two committees will stand in adjournment subject to the call of the Chair.

[Whereupon, at 12:17 p.m., the hearing was adjourned.]

[A submission for the record follows:]

STATEMENT OF REYES GONZALES, PRESIDENT, NATIONAL ASSOCIATION OF DISABILITY EXAMINERS

On behalf of the National Association of Disability Examiners (NADE), I welcome the opportunity to convey our membership's concerns about the current status of the Social Security disability program. NADE is a professional association with a membership of over 2,000 individuals engaged in a wide variety of functions within the Disability Program. The majority of our members are employed in the State Disability Determination Services adjudicating disability claims for the Social Security Administration. Other members include attorneys, physicians, psychologists and others involved in all aspects of disability evaluation. Our membership shares the public's concern with the problems existing in the Social Security and Supplemental Security Income disability programs.

Since the inception of PL 96-265, also known as the 1980 Disability Amendments, there has been considerable outcry from the public due to the accelerated process by which the claims were being reviewed and the high percentage of terminations that were being processed. After the accelerated Continuing Disability Reviews (ACDR) were instituted in 1980, State Agency termination rates ranged from 40% to 65%, some higher in some months. This was an alarming rate since the GAO study prior to 1980 indicated that approximately 20% or 1 out of every 5 individuals who were receiving disability benefits did not belong on the disability rolls. After 1980, however, State Agencies were terminating benefits at approximately the rate of 1 out of every 2 (or about 50%).

After 1980 we found that Administrative Law Judges were reversing more than 50% of State Agency terminations. State Agency staff was receiving the majority of the adverse publicity caused by the high termination rates produced by the accelerated and periodic reviews and the high reversal rates produced by the administrative Law Judges.

NADE, concerned about these high termination rates and high reversal rates, contacted members of Congress and the Social Security Administration suggesting legislative and administrative reforms.

We welcomed the passage of Public Law 97-455 in January, 1983. This law contained two provisions which afforded relief to those whose disability benefits were being ceased.

1. It temporarily provided for continuation of benefits through Administrative Law Judge (ALJ) Hearing for those individuals terminated and appealing their cases. (However, this provision has expired and beneficiaries are again faced with loss of benefits during appeal.)
2. It provided that an individual should be granted the opportunity for a Face-to-Face evidentiary hearing, during reconsideration of any decision that disability has ceased.

NADE believed that these Hearings should be conducted by Disability Examiners employed in the State Agencies and in October, 1983 the Secretary of Health and Human Services, Margaret Heckler, gave the States the option to conduct the hearings beginning in January, 1984.

All but three (3) of the States did opt to perform this function. In those states that have opted not to perform this function, or who have not been granted the option to do so by SSA, Federal Hearings Officer will conduct the Hearings.

Although this Congressional action did provide some immediate relief, it is still obvious that further legislative action is needed.

NADE believes that a clear "medical improvement" standard needs to be established. This issue cannot be left to the courts or to the individual states. We believe that a legislated definition of medical improvement is the only way to achieve national uniformity.

We believe that medical improvement needs to take into consideration improvement in medical or vocational technologies made available to the beneficiary; error on the face of the evidence of the originally allowed determination; return to work (SGA); and evidence indicating the impairment is less severe than originally proposed. In addition, NADE has two proposals which would take into account the reliance many disabled persons have come to place on the disability benefits they receive, as well as the adverse effect longevity on the roles plays in a person's successful return to the work force.

1. Beneficiaries, aged 55 years and older, who have been on the disability rolls for five years or longer, should be continued, unless there is *specific* evidence of medical improvement.
2. Beneficiaries, aged 50 years and older, who have been on the disability rolls for 10 years or more and who have not demonstrated the ability to perform past work, should be continued.

All of the aforementioned would provide equity in evaluation and less harshness than the present system, but maintain the integrity and purpose of the Disability Insurance Program.

We also recommend that a provision calling for equal reviews of both favorable and unfavorable decisions be included in any legislation passed. And legislation to continue payment of benefits through the Administrative Law Judge Hearing is urgently needed.

At the present time some states are processing no cessations, some states are recommending cessations only if medical improvement is shown, while other states processing cases under Federal guidelines are not considering medical improvement. A single definition of medical improvement applied in all states is essential to achieving national uniformity.

Currently SSA, upon the direction of Secretary Heckler in the summer of 1983, is reviewing policies and procedures under which we are adjudicating disability claims. A review of the mental disorders and the listing of impairments is also being undertaken and input has been sought from the American Psychiatric Association and other professionals.

NADE supports a moratorium of all CRDs until SSA completes its review of all policies and procedures issues national implementation dates for these current procedures with training and until the issue of medical improvement is clarified. We believe such a moratorium should be effectuated immediately and continued until such time as SSA or Congress provides a single definition of medical improvement so that all beneficiaries will be treated equally, regardless of state of residence. In November, 1983 a letter was sent to Ms. Patricia Owens, Acting Associate Commissioner for Disability for SSA, stating this position.

NADE does not support the position that the Social Security Administration either apply the decisions of Circuit Courts of Appeals to all beneficiaries residing within the states within the Circuit or appeal the decision to the Supreme Court. The Social Security Administration's current policy of non-acquiescence in the District and Appeals Court decisions would appear to be the only plausible stance under current operating procedures. Court decisions can vary from circuit to circuit. It is not reasonable for a national program to be governed by regional decisions. To require the Secretary to acquiesce or appeal individual court decisions would not promote uniformity in the decision-making process. If acquiescence is followed then even more appeals will result with the actual day-to-day functioning of the Program being quagmired as case processing proceeds on an erratic basis awaiting the settlement of injunctions, stays, and decisions.

NADE has long supported the establishment of a Social Security Disability Court. This would solve the problem of acquiescence and would lessen the congestion in appeals in the Federal courts. More importantly, it would create a single policy body for decisions, binding at all levels, and enforcing uniformity. If a legislative solution is sought to this complex problem, the establishment of a Social Security Court offers a more effective alternative.

NADE supports the creation of a permanent advisory council consisting of medical, psychological, and vocational experts to provide the necessary advice and recommendations to the Secretary on disability standards, policies, and procedures. Because we are involved in the day-to-day application of policies and procedures, and because our jobs give us a unique understanding of the impact of such policies and procedures on the claimant/beneficiary, and on the implementation of the disability program we believe a representative from NADE should be included.

NADE is concerned about the beneficiaries who are not longer assured of equal treatment in various states. Clearly we must take steps whatever cost to insure that we have a uniform national administration of this program.

Recently the Social Security Administration has gone on record indicating that the Administration opposes any disability legislation this year. We do not understand that position. The Administration has reported that the initiatives they have directed, such as the top-to-bottom review of their policies and procedures along with the evidentiary hearings will correct the current problems.

We applaud the initiatives they have taken. However, Congressional action is still needed. At least 28 states are now processing cases under different standards. Administrative initiatives are not enough to deal with the problems in the program.

There has been some concern that the medical improvement standards will be very costly to the program. We can only answer that question with another. Aren't we losing more by the lawsuits in the courts and by the growing disenchantment by the public in our program? And how much are we losing in human terms?

Despite the problems which currently exist, the Disability Examiner remains dedicated to the professions and to improving the disability program. This can be seen in participation in training programs beyond those which the State and Federal governments provide and in interest in furthering change in the laws under which decisions are made. Disability Examiners, although frustrated with the program from time to time, have not given up on it or on the desire for an equitable decision for every disability applicant and beneficiary. We support whatever efforts are necessary to make the disability insurance program a sound and equitable program for the disabled. As professionals we accept these challenges and the changes they bring to the program.

We urge your support in passing the legislation needed to return equity and uniformity to the disability program.

This concludes our statement for the record.

SUMMARY

In summary, NADE urges legislative action to improve the administration of the Social Security Disability Program. At the least we must issue legislation to:

1. Allow for the continuance of benefits through the ALJ level for those who have been terminated.
2. Provide a legislative definition of medical improvement and provide for legislation to show medical improvement prior to termination of benefits.
3. Continue to afford an individual the opportunity for a face-to-face hearing prior to termination of benefits and continue with the goal of demonstration projects to demonstrate the success of face-to-face hearings at the initial level for new disability applications.
4. Provide for uniform standards of disability determinations and more careful issuances of clarification with consistency across the regions.
5. We support the concept that the Secretary appeal certain court decisions to the Supreme Court. However, we also support the Secretary's current policy of non-acquiescence. We do not recommend application of circuit court decisions to only those states in that circuit because that would not accomplish national uniformity. We support the use of a Social Security Disability Court as an alternative.
6. We support current SSA Policy that mandated "top-to-bottom" review of all policies and procedures issued by SSA and we support the use of work groups especially from front line examiners and professionals in the medical or vocational fields, as well as from the public and private sectors to help review the current SSA policies.
7. We support legislation requiring equal reviews of both favorable and unfavorable decisions.

Thank you for the opportunity you have provided NADE to present this testimony.

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